SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

THE WASHINGTON HARBOUR
3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202) 424-7500
FACSIMILE
WWW.SWIDLAW.COM

HARISHA J. BASTIAMPILLAI
DIRECT DIAL: (202) 424-7869
FAX: (202) 424-7643
HJBASTIAMPILLAI@SWIDLAW.COM

NEW YORK OFFICE
THE CHRYSLER BUILDING
405 LEXINGTON AVENUE
NEW YORK, NY 10174
TEL.(212) 973-0111
FAX (212) 891-9598

August 6, 2003

VIA ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
CY-B402
Washington, D.C. 20554

Re: *Application of SBC Communications, Inc., et al., for Authority to Provide In-Region, InterLATA Services In Illinois, Indiana, Ohio, and Wisconsin,* WC Docket No. 03-167

Dear Ms. Dortch:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's July 17, 2003 Public Notice Requesting Comments are the Comments of ACN Communications Services, Inc., BullsEye Telecom, Inc., Choice One Communications Inc., CIMCO Communications, Inc., Indiana Fiber Works, LLC, Mpower Communications Corp., and PowerNet Global Communications, Inc.

Should you have any questions concerning this filing, please do not hesitate to call me.

Respectfully submitted,

Harisha J. Bastiampillai

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications Inc.,	)	
Illinois Bell Telephone Company, Indiana Bell	)	
Telephone Company Incorporated, The Ohio Bell	)	
Telephone Company, Wisconsin Bell, Inc., and	)	WC Docket No. 03-167
Southwestern Bell Communications Services,	)	
Inc., for Authorization Under Section 271	)	
Of the Communications Act to Provide	)	
Provide In-Region, InterLATA Service in	)	
Illinois, Indiana, Ohio, and Wisconsin	)	

COMMENTS OF ACN COMMUNICATIONS SERVICES, INC., BULLSEYE TELECOM, INC., CHOICE ONE COMMUNICATIONS INC., CIMCO COMMUNICATIONS, INC., INDIANA FIBER WORKS, LLC., MPOWER COMMUNICATIONS CORP., AND POWERNET GLOBAL COMMUNICATIONS, INC.

Andrew D. Lipman
Patrick J. Donovan
Harisha J. Bastiampillai
Swidler Berlin Shereff Friedman, LLP
3000 K Street, Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7643 (Facsimile)

Counsel for Commenters

Dated: August 6, 2003

TABLE OF CONTENTS

I. SBC FAILS TO COMPLY WITH CHECKLIST ITEM 2 IN REGARD TO OSS 2

A. SBC Still Has Not Demonstrated That Its OSS Meets The Requirements of the Section 271 Checklist 2

B. Pervasive Wholesale Billing Problems Still Remain Uncorrected 4

C. SBC's Performance Data Still Proves to be Unreliable 11

D. Other OSS Issues Remain Uncorrected 15

1. Line Loss Notification 15

2. Order Rejects 18

3. Order Completion Notices 20

4. Change Management Process 22

5. Loop Makeup Information 29

II. SBC'S END-AROUND OF THE RATE SETTING PROCESS TO OBTAIN HIGHER UNE RATES CREATES TREMENDOUS REGULATORY UNCERTAINTY IN ILLINOIS 30

A. Legal Standard 30

B. Status of Illinois Pricing 30

C. The Specter of the Illinois Legislation Precludes a Finding of Compliance with Checklist Item 2 32

D. Interim Rates Heighten the Regulatory Uncertainty CLECs Face In Illinois 35

III. SBC'S UNTIMELY LOOP PROVISIONING VIOLATES CHECKLIST ITEM 2 36

IV. SBC DOES NOT MEET PARITY REQUIREMENTS IN REGARD TO CHECKLIST ITEM 4 39

V. SBC'S APPLICATION IS NOT IN THE PUBLIC INTEREST 41

A. The Legal Standard 41

B. SBC Has Denied Competitors' Access to DLC Loops 44

C. SBC's End-Around of the Illinois Commission Does Not Bode Well for the Illinois Marketplace 54

VI. CONCLUSION 56

Exhibit A – Mpower Analysis of Ameritech Illinois Trouble Report Performance

SUMMARY

The trend in Section 271 applications has been for an applicant to obtain authority in its lead state and then have its subsequent applications ride the "coattails" of the lead application. SBC, which has made Michigan its lead application in the Ameritech region, has been unable to do this because it has either had to withdraw its applications in that state or have them rejected. The prospects do not look promising for its most recent application as the Department of Justice has stated that it is in no position "to support this application based on the current record." Puzzlingly, SBC forges ahead and files an application for the remaining four states in the Ameritech region. Perhaps SBC thought this application would allay the Commission's concerns about the Michigan application. If this is the case, SBC is clearly mistaken, as the Four State Application demonstrates that the same problems SBC purports to have resolved in Michigan remain. If anything SBC's Four State Application suggests that the problems its applications have demonstrated in Michigan are endemic problems.

Pervasive problems remain in regard to wholesale billing as SBC's systems cannot support even the most basic of functions such as implementing a bill-and-keep arrangement for local traffic. SBC continues to provide inaccurate and unauditable bills. One would think that given SBC's billing problems, its collection department would be more cautious, but yet SBC still aggressively threatens carriers with disconnection over clearly disputed charges. SBC's protracted dispute resolution process raises the unfair and unwarranted specter of disconnection of service for many CLECs.

Other OSS problems that were raised in Michigan, and made the subject of performance compliance plans, continue to percolate in the other states in the Ameritech region. Line loss notifications continue to be untimely and unreliable. Order completion notices are either lost or

are very late thereby greatly hampering a CLEC's ability to bill for the services it renders. SBC also continues to fail to meet vital performance metrics. SBC's Change Management Process is fraught with peril for CLECs as each new version resurrects problems that were supposed to have been resolved in previous versions. Moreover, rather than using its Change Management Process as a way to evolve to region-wide best practices, SBC prefers to drag its processes down to the lowest common denominator of performance.

Realizing that its commercial performance would serve as a death knell to its application, SBC attempts to distract the Commission's review by invoking its third party testing. The third-party audit conducted by BearingPoint has yet to be completed, however. SBC's solution was not to work with BearingPoint and resolve performance issues, but instead to commission its financial auditor, Ernst & Young, to conduct its own study. As Staff of the Illinois Commerce Commission noted, however, under either third-party test, SBC's performance is lacking and there are serious concerns about the integrity of the data.

The Commission often relies on state commissions to lay the foundational record for its Section 271 evaluations and in this case Staff of the Illinois Commerce Commission has delivered one of the most comprehensive, if not, the most comprehensive evaluations of a Section 271 application. The evaluation numbers nearly 1,000 pages and was conducted in two phases with numerous CLECs participating. Illinois Staff highlighted many areas of SBC non-compliance with checklist requirements. The Illinois Commerce Commission acknowledged many of the concerns raised by Staff, and shared those concerns, but was willing to overlook them based on promises of future performance by SBC. If the Michigan application has demonstrated anything, however, it is the fact that SBC's promises of future performance are just that – promises; unfulfilled promises.

Perhaps the Illinois Commission was a bit wary after the unprecedented attack on its authority by SBC. Dissatisfied with UNE rates in Illinois, SBC succeeded in getting the Illinois legislature and Governor to mandate higher UNE rates by fiat, with no concern played to what rates the costs actually supported. The Illinois Commission had no option but to accede. Luckily a U.S. federal court enjoined this action, but it does not erase SBC's total subversion of the requirements of the 1996 Act. A carrier that cannot comply with the framework laid out by the 1996 Act has no right to benefits the Act provides. Moreover, the appeal of this ruling by SBC precludes a finding that its rates are TELRIC-compliant.

SBC's bypass of the Illinois Commission is but one example of its anticompetitive practices that demonstrates that its application is not in the public interest of any of the four states. SBC also has a history of denying access to CLECs of vital UNEs including shared transport and loops served by digital loop carrier systems. CLECs have to expend much time and money simply to access UNEs to which they are entitled under the law. These are not the actions of an applicant that has opened its marketplace fully and irreversibly to competition.

SBC's application continues to be deficient in regard to vital checklist items and this is a fact the Commission should not allow to get lost in the torrent of applications that SBC has filed. SBC's mantra appears to be "If at first you don't succeed, file another application." The Commission should send a clear signal to SBC that it needs to resolve these outstanding problems in the Ameritech region, and actually pass muster in one state, before attempting to garner region-wide approval – an approval it does not deserve.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Joint Application by SBC Communications Inc.,	)	
Illinois Bell Telephone Company, Indiana Bell	)	
Telephone Company Incorporated, The Ohio Bell	)	
Telephone Company, Wisconsin Bell, Inc., and	)	WC Docket No. 03-167
Southwestern Bell Communications Services,	)	
Inc., for Authorization Under Section 271	)	
Of the Communications Act to Provide	)	
Provide In-Region, InterLATA Service in	)	
Illinois, Indiana, Ohio, and Wisconsin	)	

COMMENTS OF ACN COMMUNICATIONS SERVICES, INC., BULLSEYE TELECOM, INC., CHOICE ONE COMMUNICATIONS INC., CIMCO COMMUNICATIONS, INC., INDIANA FIBER WORKS, LLC, MPOWER COMMUNICATIONS CORP., AND POWERNET GLOBAL COMMUNICATIONS, INC.

ACN Communications Services, Inc. ("ACN"), BullsEye Telecom, Inc. ("BullsEye"), Choice One Communications Inc. ("Choice One"), CIMCO Communications, Inc. ("CIMCO"), Indiana Fiber Works, LLC ("Indiana Digital"), Mpower Communications Corp. ("Mpower"), and PowerNet Global Communications, Inc. ("PowerNet") submit these comments concerning the Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. (collectively referred to as "SBC" or "Ameritech Illinois," "Ameritech Indiana," "Ameritech Ohio," and "Ameritech Wisconsin"), for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA

Service in Illinois, Indiana, Ohio, and Wisconsin ("Application").[1] For the reasons stated in these comments, the Commission should deny the Application.

I. SBC FAILS TO COMPLY WITH CHECKLIST ITEM 2 IN REGARD TO OSS

A. SBC Still Has Not Demonstrated That Its OSS Meets The Requirements of the Section 271 Checklist

It is somewhat ironic that SBC files its application for the States of Illinois, Indiana, Ohio, and Wisconsin the day after the United States Department of Justice noted in regard to SBC's Michigan application that it was in no position "to support this application based on the current record" due to lingering issues in regard to SBC's OSS, and in particular, its wholesale billing.[2] These two events are of more than mere coincidental value as SBC utilizes the same OSS in Illinois, Indiana, Ohio, and Wisconsin as it does in Michigan.[3] What is particularly disturbing is SBC's continual failure to make its OSS Section 271 compliant in the Midwest region despite numerous bites at the apple, and numerous promises of improved performance. SBC is in the midst of its [fourth] Section 271 application in Michigan; the previous three having failed primarily due to OSS issues. Each application, including the ones currently pending, bring more and more "compliance assurance plans" on the state level, and representations by SBC that it has "fixed" the problems. The OSS problems remain, however.

What is particularly disquieting is SBC's claims that problems it has "fixed" continue to percolate. For instance, as discussed in more detail below, and as the Department of Justice noted in its Michigan II Evaluation, "persistent questions remain concerning billing accuracy."[4]

---

[1] *Comments Requested on the Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Illinois, Indiana, Ohio and Wisconsin*, Public Notice, WC Docket No. 03-167, DA 03-2344, released July 17, 2003.

[2] WC Docket No. 03-138, Evaluation of the U.S. Department of Justice at 2 (July 16, 2003) ("DoJ MI II Evaluation").

[3] *See* Application, Joint Affidavit of Mark J. Cottrell and Beth Lawson Regarding Operations Support Systems (Cottrell/Lawson Affidavit).

[4] DoJ Michigan II Evaluation at 6.

Problems regarding line loss notifications which seemed to have lessened in Michigan continue to appear in Illinois. SBC appears to be taking a "band-aid" approach to its OSS problems trying to stem the bleeding enough to get its applications approved. It is clear, though, given the persistence of these problems in the Midwest region, that the OSS problems are much more endemic and in need of more permanent solutions. The fact that SBC is not able to string together three months worth of compliant OSS performance in Illinois bodes ill for the future of competition.

Checklist Item 2 requires that a BOC provide non-discriminatory access to network elements.[5] OSS and the information they contain are critical to the ability of competing carriers to use network elements and resale services to compete with BOCs.[6] In analyzing whether a BOC provides non-discriminatory access to its OSS for Section 271 purposes, the Commission has adopted a two-step approach. First, the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[7] The Commission has traditionally focused on the functionality and capacity of the BOC's OSS in its analysis of this step.

In the second step, the Commission determines "whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle

---

[5] 47 U.S.C. § 271(c)(2)(B)(ii).

[6] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan,* CC Docket No. 97-137, FCC 97-298, ¶ 130 (Aug. 19, 1997) ("*Michigan Order*").

[7] *Michigan Order* at ¶ 136. *See In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas,* CC Docket No. 00-65, FCC 00-238 at ¶ 96 (June 30, 2000) ("*Texas Order*").

reasonably foreseeable demand volumes."[8] It looks at performance measures and other evidence of commercial readiness. With respect to the instant Application, both the general functionality/capability of SBC's OSS and its performance at the various stages of the OSS process demonstrate that SBC is not satisfying the requirements of the competitive checklist in regard to OSS.

B. Pervasive Wholesale Billing Problems Still Remain Uncorrected

Under checklist item 2, a BOC must demonstrate that it provides competitive LECs with wholesale bills that are complete, accurate, readable, auditable and timely.[9] The Commission has found that these qualities in wholesale billing are essential for competitive carriers if they are to have a meaningful opportunity to compete.[10] The Commission has noted:

> Inaccurate or untimely wholesale bills can impede a competitive LEC's ability to compete in many ways. First, a competitive LEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC. Accurate and timely wholesale bills in both retail and BOS BDT formats thus represent a crucial component of OSS.[11]

---

[8] *Michigan Order* at ¶ 138; *See Texas Order* at ¶ 96.

[9] *In the Matter of Application by Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, (CC Docket No. 01-138), ¶12 ("*Pennsylvania 271 Order*"). *See also Bell Atlantic New York 271 Order*, 15 FCC Rcd at 3989, ¶ 82.

[10] *Pennsylvania 271 Order* at ¶ 15.

[11] *Pennsylvania 271 Order* at ¶ 23.

The Department of Justice has added that "[a]ccurate and auditable electronic bills are an important factor in making telecommunications markets fully and irreversibly open to competition."[12]

Two categories of billing data are to be scrutinized in Section 271 cases – usage data of a CLEC's customers, and wholesale bills for UNEs and interconnection services. In noting the withdrawal of SBC's previous application in Michigan, Chairman Powell noted that "outstanding issues" prevented approval and that "perhaps the most troubling of these issues relates to billing. Despite extensive examination of the record . . . questions remain regarding whether SBC is currently providing wholesale billing functions for competitive LECs in a manner that meets the requirements of our existing precedent."[13] These questions persist in regard to this application as well.

The Joint Commenters' experience with SBC's wholesale billing operations belie the portrait of compliance offered by SBC. SBC has problems even establishing the most fundamental OSS elements. For instance, SBC and Mpower have a bill-and-keep arrangement for local, Section 251(b)(5) traffic. One would think given the ardor in which SBC has pursued bill-and-keep compensation for local traffic that its billing systems would be able to support such an arrangement. Instead, SBC systems continue to bill Mpower's local termination traffic at the local rate. Mpower then has to file disputes every month on these charges. SBC does eventually issue credits, but the time Mpower has to expend filing disputes, and seeking credits, unnecessarily taxes its resources. One would think that SBC's billing systems should be able to

---

[12] *DoJ MI I Evaluation* at 11, *citing*, DoJ Pennsylvania Evaluation at 11.

[13] Statement of Chairman Powell on Withdrawal of SBC's 271 Application for Michigan, Press Release (Apr. 16, 2003).

support bill-and-keep arrangements, and, if not, that SBC would make the requisite changes to support such arrangements.

Mpower has also been improperly billed charges. On hot cuts, Mpower is improperly billed a trip charge in addition to the charge for the hot cut. The trip charge should be encompassed within the hot cut charge. Mpower has disputed these charges, but SBC's billing dispute resolution process leaves much to be desired. SBC still continues to include disputed charges within outstanding balances and it assesses late charges on these disputes. Thus, Mpower has to re-dispute the already disputed charges every month.

The situation is rendered more problematic by the fact that there seems to be little coordination between SBC's Billing Dispute department and its Collection department. The Collection Department threatens Mpower with discontinuation of service over these charges despite the fact that they are disputed. Mpower's customers face disconnection of service over SBC's misguided billing. This affects not only Mpower but also carriers to which Mpower has transferred lines. SBC has placed holds on these accounts due to the disputed amounts such that the carriers cannot add lines to the account.

Mpower and SBC also agreed that disputed amounts would be placed in an escrow account. SBC abuses this process, however, by automatically rejecting any dispute Mpower files without any investigation. SBC informs Mpower that if it wants the dispute investigated it must pay the disputed amount into escrow. This contravenes the parties dispute resolution process which requires that SBC investigate disputes in a timely manner. Thus, SBC knows it can bill erroneously and force CLECs to tie up vital revenues in escrow accounts, all as a condition of it performing a duty it is obligated to do, *i.e.,* investigate disputes.

The Commission, therefore, should investigate not only the timeliness and accuracy of SBC's wholesale bills but also the expediency with which SBC makes a commitment to resolve billing disputes. The Joint Commenters have found SBC's dispute resolution process to be highly cumbersome and inefficient. Not only have SBC's overbilling practices siphoned thousands of dollars from the Commenters, but now the Commenters have been forced to devote a growing share of their monetary and personnel resources to monitor their wholesale bills and prosecute disputes with SBC. SBC's flawed billing system thereby undermines the ability of the Commenters to compete effectively in the market.[14] CLECs should not have to expend valuable time and resources in making sure that SBC gets its bills right.

Mpower's problems are in accord with a long list of complaints pertaining to billing documented during the Illinois 271 proceeding.[15] WorldCom, McLeodUSA, and Forte all noted that they experienced either inappropriate charges or charges assessed at the wrong rate.[16] TDS Metrocom documented a litany of problems with Ameritech Illinois's bills including failure to bill, or underbilling for services for extended periods, followed by substantial backbills, billing for services and products not provided, double-billing, application of incorrect rates, failure to implement price changes on a timely basis, improper application of payments, and failure to provide source or back-up data.[17] The performance data corroborated the experiences of the CLECs. Ameritech Illinois failed to achieve parity in two of the last three months for three Billing Completeness metrics (PM 17-03, 17-04, and 17-05).[18]

---

[14] See *Pennsylvania 271 Order* at ¶ 15..

[15] Commenters, unless otherwise specified, will focus their OSS analysis on Illinois since Illinois conducted the most comprehensive OSS evaluation, and since SBC uses the same OSS in the Midwest Region. Thus, problems in Illinois in regard to OSS would likely appear in the other states as well.

[16] Illinois 271 Order at 241.

[17] Illinois 271 Order at 341.

[18] Application, Ehr Illinois Affidavit, ¶ 60.

TDS Metrocom reported instances of SBC backbilling for directory assistance services for twelve months and calling name and delivery service for sixteen months.[19] Backbills are particularly problematic. For backbills pertaining to services billed to the end-user, the CLEC will be unable to bill its customer months later for services. To maintain good customer relations, the CLEC will have to absorb these charges. For charges that are not billed to the end-user, the CLEC still has to adjust its financial plans and budgets and deal with mismatches of revenues and costs.[20] The Commission has noted that delays in billing significantly longer than 160 days could be found to be unjust and unreasonable.[21] Here SBC was backbilling for periods of more than a year.

Choice One has also experienced similar backbilling issues with SBC. In addition, Choice One notes that not all of SBC's invoices are available electronically. Also, in Indiana and Michigan, transit charges for access to the CNAM database are on separate invoices while all other CNAM charges are on one invoice. As a result, Choice One has multiple invoices to audit.

The Commission has held that bills for wholesale services provided by ILECs must be auditable.[22] WorldCom noted significant problems in regard to bill auditability.[23] AT&T notes that SBC's bills are not auditable and that there is no finding by Bearing Point that the bills are auditable.[24] One of SBC's main retorts on this issue was that concerns regarding bill auditability

---

19 Illinois 271 Order at 248.

20 Illinois 271 Order at 342.

21 *See, Brooten v. AT&T*, Memorandum Opinion and Order, File No. E-96-32, 11 FCC Rcd 13343, (1997)

22 *Pennsylvania 271 Order*, ¶ 23.

23 Illinois 271 Order at 250.

24 Illinois 271 Order at 323. BearingPoint is the company that the state commissions in the Ameritech region commissioned to conduct third party testing of SBC's OSS.

are being addressed in the Michigan Improvement Plan for Bill Auditability,[25] but it is clear given continuing billing issues in Michigan that the problems are not being adequately addressed. This Plan also does nothing to address the vexing problem of backbilling or the inadequacy of billing performance metrics. It also provides for no third-party verification of successful implementations of purported process improvements.[26]

SBC attempts to sidestep the deficiencies in billing that its commercial performance indicates by invoking the "comprehensive, painstaking" third-party testing of its billing systems conducted by Bearing Point. As the Staff of the Illinois Commerce Commission ("Illinois Staff") noted Bearing Point's test was hardly comprehensive.[27] For instance, Bearing Point's test did not cover, among other things: i) volume or functional testing of the LSOG5 version of Ameritech Illinois' EDI or COBRA application to application interfaces, ii) billing reconciliation process; iii) timeliness of DUF records return process and return status mechanism; iv) prioritization of calls for billing support; v) completeness and accuracy of debit and credit adjustments; and vi) the completeness and accuracy of late charges.[28] Thus, this testing would not address SBC deficiencies in regard to billing dispute resolution. Also, since Bearing Point did not submit payments to SBC there would be no way to test SBC's application of payments or late payment charges.[29]

Staff also noted that:

> [A]lso it is generally known that the Bearing Point billing tests were not considered to be blind (SBC knew the identity of the test CLEC while the tests were conducted). In addition, the billing tests were conducted on clean customer

---

[25] Illinois 271 Order at 250.

[26] Illinois 271 Order at 345.

[27] *Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, Illinois Commerce Commission Docket No. 01-0662, Brief on Exception of the Staff of the Illinois Commerce Commission at 25 (April 18, 2003) ("IL Staff Exceptions").

[28] *Id.* at 25-26.

[29] Illinois 271 Order at 343.

> accounts and the billing CLEC had a single interconnection agreement that had no amendments or rate changes throughout the course of the test. In other words, the tests that were conducted by Bearing Point represented the simplest possible fact situation, a new customer account and a single, un-amended CLEC interconnection agreement.[30]

Based on the limited value of this testing, Staff noted that the Bearing Point report could not be used as a basis for validating all of Ameritech Illinois' billing systems.[31] Staff concluded that:

> Given that the Commission can no longer base checklist compliance for OSS billing upon the fact that Bearing Point tested "all" billing functionality, that the Commission as presented in the proposed order has found great concern with the multitude of billing issues raised in this proceeding, that the Commission has required various remedial actions and demonstrations of the Company with respect to billing issues, and the FCC's statements that billing issues remain in the FCC MI 271 proceeding and are a barrier to granting Section 271 approval, Staff recommends that the Commission has no other reasonable option but to find SBC Illinois not in compliance with Section 271 for checklist item (ii) as it relates to billing OSS functionality.[32]

The Illinois Commission acknowledged "many serious billing issues" of which it "remained concerned."[33] The ICC noted that these issues "standing alone in the aggregate would suggest that there are substantial problems with SBC's ability to render timely and accurate wholesale bills on a consistent basis to its CLEC customers."[34] Amazingly, however, the ICC found Ameritech Illinois application to be checklist compliant in regard to billing relying on the Michigan Bill Auditability and Dispute Resolution Plan and promises of future compliance on the part of Ameritech Illinois. The former has yet to be proven to be effective, and the latter is hardly worth the paper they are written on given the protracted nature of these billing problems. The ICC concedes that it is hoping that the Plan coupled with "additional road maps for demonstrating compliance" will solve the billing deficiencies.[35] It is clear then that Ameritech Illinois' billing systems are not currently checklist compliant, and the hope on the part of the

---

30 *Id.*
31 *Id.*
32 *Id.* at 28.
33 Illinois 271 Order at 354.
34 Illinois 271 Order at 355.
35 Illinois 271 Order at 357.

Illinois Commission is that one day they will be. This is not sufficient to pass muster under Section 271. This Commission has declined to rely on promises of future performance in connection with the Section 271 process. As the Commission has held:

> the Commission has found that a BOC's promises of *future* performance to address particular concerns raised by commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271. In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.[36]

It is plain that SBC has not met the checklist requirements with regard to billing and that SBC's deficiencies in this area have tremendously impacted CLECs. This is not a recent problem, but rather one that has been going for years. There is no basis to rely on promises of future performance; instead, SBC should be required to demonstrate actual compliance before receiving Section 271 authority. When one considers SBC's billing problems in concert with its other OSS problems, discussed below, the conclusion is inescapable that SBC has failed to demonstrate compliance with Checklist Item 2.

C. SBC's Performance Data Still Proves to be Unreliable

The Commission has previously relied on a combination of performance data and third-party testing to evaluate the overall functionality and capability of an applicant's OSS. The Commission has stated:

> [w]e examine performance measurements and other evidence of commercial readiness to ascertain whether the BOC's OSS is handling demand and will be able to handle reasonably foreseeable demand volumes. The most probative evidence that OSS functions are operationally ready is actual commercial usage. Absent data on commercial usage, the Commission will consider the results of the carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the scope of commercial readiness of a BOC's OSS. We reiterate, however, that the persuasiveness of third-party review is dependent upon the

---

[36] *SBC TX 271 Order* at ¶ 38.

> qualifications, experience and independence of the third party and the conditions and scope of the review itself.[37]

As the Department of Justice has noted, "[P]erformance metrics must be reliable – meaningful, accurate, and reproducible – if they are to fulfill their dual purposes of depicting an incumbent's present level of performance and of establishing performance benchmarks that enable regulators to detect "backsliding" and constrain anticompetitive behavior effectively."[38] The Department of Justice notes that the "reliability of SBC's metrics continues to be strongly contested, especially in light of continuing delays with the Bearing Point audit."[39] Bearing Point was commissioned to do comprehensive performance measures audits by the Michigan PSC and the Illinois Commerce Commission, and the audits still remain months from completion.[40] Illinois Commerce Commission Staff concluded that:

> Of the five primary test families that BearingPoint conducted tests upon, SBC Illinois has only satisfied the PMR2 review. SBC Illinois has been unable to demonstrate to BearingPoint that it can satisfy the evaluation criteria with respect to its data collection and storage capabilities, its metric change management policies and practices, its performance measure data integrity and its ability to calculate its performance measurements results and retail analogs. The specific metric deficiencies reported by BearingPoint which to these test aspects and the evaluation criteria BearingPoint has been unable to opine upon 26 months after beginning the evaluation of SBC Illinois' performance metrics data and reporting systems, provides . . . clear indication that there is more work to be done and that at this time, we should not rely upon the performance measurement data being reported by the company.[41]

Clearly not satisfied with the negative picture of its OSS that the BearingPoint study was providing, SBC commissioned its own financial auditor, Ernst & Young, to conduct its own audit. There are numerous reasons why this audit would provide a less accurate and comprehensive insight into SBC's OSS as compared to the BearingPoint test. First, parties

---

37 *BellAtlantic NY 271 Order* at ¶ 89.
38 DoJ MI II Evaluation at 12.
39 DoJ MI II Evaluation at 12.
40 DoJ MI II Evaluation at 12, n. 60.

lacked an adequate opportunity to take discovery from, and cross-examine, Ernst & Young in the proceeding.[42] Second, unlike BearingPoint, Ernst & Young was not selected by any of the four state PUCs, nor did the PUCs have any input into the selection.[43] Third, the BearingPoint review was an open and transparent process conduct under the aegis of Illinois Commerce Commission Staff. The Ernst & Young review was a closed private process involving only SBC and Ernst & Young. Fourth, Ernst & Young applied a "materiality" standard in regard to the exceptions it reported that may have masked significant performance shortcomings.[44] Fifth, Ernst & Young did not submit its own transactions to SBC thus denying a point of comparison.[45] Sixth, there appear to be limitations to the scope of review in the Ernst & Young audit that were not found in the BearingPoint audit.[46]

Remarkably, even with all these qualifications to the Ernst & Young audit, the audit "did not provide substantiation of the reliability and accuracy of SBC Illinois' performance metrics."[47] Instead, this review also disclosed serious concerns. For instance, there were 128 exceptions reported which detailed "instances of material noncompliance with the Business Rules during the Evaluation Period."[48] These exceptions affected approximately 75% of the overall performance measures. For 51 of these exceptions, SBC did not restate data, and for seven of these exceptions, SBC took no corrective action. Ernst & Young also reported 50 "interpretations" in which Ernst & Young found that SBC's calculation of a performance

---

41 Illinois 271 Order at 694.

42 Illinois Commerce Commission Docket No. 01-0662, McLeodUSA Telecommunications Services, Inc. and TDS Metrocom, LLC's Brief on Exceptions to the Administrative Law Judge's Proposed Final Order on Investigation at 47 (Apr. 18, 2003) (McLeodUSA/TDS Exceptions).

43 McLeodUSA/TDS Exceptions at 48.

44 McLeodUSA/TDS Exceptions at 50.

45 McLeodUSA/TDS Exceptions at 50.

46 McLeodUSA/TDS Exceptions at 51.

47 McLeodUSA/TDS Exceptions at 52.

48 McLeodUSA/TDS Exceptions at 52.

measure was based on an interpretation of a business rule that Ernst & Young concluded did not appear in the business rule. These interpretations affected 94 different performance measures.[49]

Based on these findings, Staff concluded that "there continued to be serious problems" with Ameritech Illinois' performance data, that there are 15 Category V exceptions (affecting 29% of the performance measures) that SBC has not yet corrected, that SBC did not discuss all of its business rule interpretations in the six-month review collaborative nor did it obtain approval from Staff for these interpretations. Staff determined that SBC was not reporting its performance measures consistent with its Business Rules and that there were control deficiencies that have not been thoroughly addressed. Staff concluded that "problems remain with SBC Illinois' reported performance measurement data, and the data submitted by SBC Illinois as evidence of its Section 271 compliance is neither accurate nor reliable."[50]

The Illinois Commerce Commission once again brushed aside the findings of its Staff finding that most of the exceptions were ultimately corrected and that for the remaining ones SBC has provided assurance that it will address them.[51] Disregarding for the moment the fact that the Illinois Commerce Commission once again rests on assurances of future performance, perhaps more troubling is the fact that the ICC did not question why there were so many exceptions and interpretations to begin with. The ICC myopically focused on whether individual problems were fixed for the moment without asking "whether these individual deficiencies show a systemic pattern of problems in SBC's performance metrics processes, as well as a likelihood of recurrence."[52] Unlike its Staff, the Illinois Commerce Commission failed to see the bigger picture and the bigger picture clearly showed substantial concerns about SBC's data.

---

49 McLeodUSA/TDS Exceptions at 53.
50 Illinois 271 Order at 704
51 Illinois 271 Order at 753.
52 McLeodUSA/TDS Exceptions at 53.

The concerns about the completeness and accuracy of SBC's data seriously undercuts its claim that it is in compliance with Checklist Item 2. The data that SBC does submit also does not provide support that SBC is in checklist compliance.

D. Other OSS Issues Remain Uncorrected

1. Line Loss Notification

Line loss notifications inform a CLEC when its customers have left for other carriers, either SBC or other CLECs. Until a CLEC receives such a notification, it will continue to bill the customer. The customer's new carrier will also commence billing the customer; thus, the customer will be double billed for the same service. The target of blame will frequently be the customer's new carrier despite the fact that the real cause was SBC's failure to provide a timely line loss notification. As the Michigan PSC noted, this double billing could have "serious negative effects on the reputations of . . . competing providers."[53]

In Illinois, the problems with line loss notification were so severe that the Illinois Commerce Commission had to apply emergency relief to prod SBC to develop a plan to fix the problem.[54] In Michigan, where SBC utilizes the same line loss notification system, SBC's performance in regard to line loss notifications has been "incomplete, untimely, and unreliable."[55] The problems in Michigan continued despite the Michigan PSC requiring SBC to submit a plan identifying specific improvement measures in this regard.[56] As the Michigan PSC

---

53 *Report of the Michigan Public Service Commission*, In the Matter, on the Commission's Own Motion, to Consider SBC's, f/k/a Ameritech Michigan, Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996, Case No. U-12320 ("*Michigan PSC Report*") (Mi. PSC Jan. 13, 2003) at 68-69.

54 *DoJ MI I Evaluation* at 9-10.

55 *DoJ MI I Evaluation* at 8.

56 *Michigan PSC Report Companion Order* at 6.

noted, without such improvements, it cannot "assume that a trouble free environment will now exist."[57]

In Illinois, Ameritech Illinois did implement certain remedial measures recommended by Staff, but Staff stated that it "remains unconvinced that further line loss notification operational problems will not occur given the nature of the problems that have been seen to date."[58] Staff noted that the fact that the line loss notification problems have continued even after SBC implemented remedial measures warrants that the Illinois Commerce Commission monitor SBC's performance in this area over a period of time to determine that the problem will not recur. As Staff noted, failure to provide timely line loss notification is evidence of discriminatory treatment on the part of SBC because SBC does not need line loss notifications to stop billing a customer.[59]

BullsEye notes that despite SBC's repeated promises in both the Illinois and Michigan 271 proceedings to improve line loss notification, the line loss notifications are still not 100% correct or timely. Mpower has experienced a particularly glaring example of the problems caused by untimely line loss notifications. One of its customers has been with Mpower for two years, but is still continuing to be billed by McLeodUSA as well. It turns out that Ameritech never sent McLeodUSA a line loss notification. McLeodUSA sent this customer a collection notice because it was continuing to be billed by Ameritech for the circuit. This one example speaks volumes about Ameritech's line loss notifications, or lack thereof. Ameritech's failings in this area wreak havoc on the billing systems of CLECs and paint their performance in a poor light. Since two CLECs are involved the customer will presume that this is a CLEC issue as opposed to an SBC issue.

---

57 *Michigan PSC Report* at 68.
58 Illinois 271 Order at 192.

What is particularly troubling is that despite both the Illinois and Michigan state commissions requiring SBC to make specific performance improvement measurements, the performance still has not risen to an acceptable level. If this is SBC's best performance under the glare of the Section 271 spotlight, one wonders what the future will hold.

WorldCom described the line loss notification problem as perhaps the biggest problem it has faced in the Ameritech region affecting thousands of its customers.[60] WorldCom noted that despite repeated promises on the part of SBC to improve performance in this area and purported fixes, the problems recur.[61] WorldCom observed that the "persistent and nagging LLN deficiencies" demonstrate that SBC's OSS is not stable.[62] AT&T noted that it has endured line loss notification problems almost from the time it entered the Illinois market in June 2002, and that the problem has affected thousands of its customers. SBC's failure to correct this problem, AT&T observed, demonstrates that SBC is slow or inadequate in fixing flaws in its OSS.[63]

In Michigan, the Department of Justice noted that SBC has failed to establish a "suitable level of performance" in this area, and that it must introduce further evidence sufficient to show that it is currently capable of providing effective wholesale support in this area.[64] As the Department of Justice noted, "precise delivery of line loss notifications is vital for a healthy competitive environment in Michigan."[65]

Despite the enduring nature of this problem, and despite recognizing that the line loss notification problem has not "fully abated," the Illinois Commerce Commission excused SBC's

---

59 Illinois 271 Order at 193.
60 Illinois 271 Order at 274.
61 Illinois 271 Order at 275.
62 Illinois 271 Order at 279.
63 Illinois 271 Order at 327.
64 *DoJ MI I Evaluation* at 10.
65 *DoJ MI I Evaluation* at 8-9.

failures based once more on SBC's invocation of a magical performance improvement plan. The ICC said its based its finding of compliance "heavily" on this Line Loss Plan and SBC's implementation of further commitments proposed by Staff. Incredulously, the ICC contends these are not "paper" promises, but concrete commitments on the part of SBC.[66] SBC has been making these commitments/promises through Phases I and II of the Illinois proceeding, and the problem still persists. This is why the Commission should not, and must not, rely on the future promises of performance on the part of SBC.

2. Order Rejects

This Commission has previously focused on flow-through rates as an indica of parity in the ordering stage.[67] As ILEC ordering systems become more mechanized, flow-through rates have ceased to be the prime area of inquiry. Instead this Commission has focused on an ILEC's "overall ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its systems."[68]

Given the prevalence of high rejection rates and low flow-through rates, the timing of the delivery of rejection notices becomes all the more critical. Failure to return timely rejection notices is particularly harmful because "new entrants cannot correct errors and resubmit orders until they are notified of their rejection."[69] AT&T has observed that the situation is compounded in situations where not only are there high rejection rates, but when rejection notices are manually typed by a SBC representative before they are sent to CLECs – a process that leads to

---

[66] Illinois 271 Order at 353.

[67] "Flow-through" refers to orders that are transmitted electronically through the gateway and accepted into the ILEC's back office ordering systems without manual intervention. *BANY* Order at ¶ 160, fn. 488. The flow-through rate often "serves as a yardstick to evaluate whether an incumbent LEC's OSS is capable of handling reasonably foreseeable commercial volumes of orders." *Id.* at ¶ 162, fn. 496.

[68] *Id.* at ¶ 163.

[69] *Id.* at p. 43 *citing Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539, ¶ 117 (1997).

excessive delays.[70] SBC retail ordering systems, however, possess capabilities that allow for all but a small percentage of errors to be detected electronically before the order is even submitted.[71] The adverse effects of CLECs on untimely reject notification is starkly demonstrated by CLEC's experience with SBC's systems in Texas. As MCI WorldCom pointed out:

> Orders that are rejected take far longer to complete especially when rejects are manually processed. SWBT takes more than six hours on average to manually process the rejects which are then returned to the CLECs. The CLECs must in turn determine the problem with the initial order, correct that problem – which often requires significant work by the CLEC and re-transmit the order. Even the re-transmitted order is likely to take longer to process than a typical order. This is because SWBT manually processes all supplemental orders to correct manually processed rejects. Thus, SWBT's high reject rate, high level of manual processing of rejects, and slow return of those rejects pose a substantial barrier to CLEC entry.[72]

BullsEye has noted that order rejects have increased since conversion to LSOG 5. The fact that rejects have heightened in a new version suggest that the problems are much more endemic than SBC would like this Commission to believe. Illinois Commerce Commission Staff determined that SBC needed to demonstrate improvement in regard to three vital performance measurements pertaining to timeliness of order rejects: PM 10.1 (Percent mechanized rejects returned within one hour); PM 10.2 (Percent manual rejects received electronically and returned within 5 hours); and PM 10.3 (Percent manual rejects received manually and returned within 5 hours). Staff notes that SBC has consistently missed the benchmarks for 10.2 and 10.3 and has problems with 10.1. As noted above, the untimely nature of the manual rejects is particularly troubling and will only build further delay in the ordering process. Staff stated that SBC should

---

70 *AT&T SBC TX 271 Comments* at p. 49.

71 *AT&T SBC TX 271 Comments*, p. 50.

72 *WorldCom SBC TX 271 Comments*, p. 28 (citations omitted).

be required to address these deficiencies as "CLECs require timely notification of errors on their orders in order to be able to provide efficient and timely service to their customers."[73] SBC's response was not to improve performance in this area, but rather to successfully convince the collaborative to alter the benchmark. As Staff astutely noted, however, "simply because the new definition of the performance measure does not specify a benchmark . . . does not mean that it is acceptable for SBC Illinois' performance in this area to degrade."[74]

3. Order Completion Notices

An order completion notice is the final confirmation that the order has completed by SBC. As this Commission has noted:

> An order completion notice informs a competing carrier that [the ILEC] completed the installation of the service requested by the particular order, which provides notice to the carrier that it has responsibility for the customer's care and may begin billing the customer for service. Until the competing carrier receives a completion notice, the carrier does not know that the customer is in service, and cannot begin billing the customer for service or addressing any maintenance problems experienced by the customer. Thus, untimely receipt of order completion notices directly impacts a competing carrier's ability to serve its customers at the same level of quality that [the ILEC] provides to its retail customers. Accordingly, the Commission has instructed a section 271 applicant to demonstrate that it provides competing carriers with order completion notices in a timely and accurate manner.[75]

BullsEye has noted that after the conversion to LSOG, order completion notices are sent much later by SBC with earlier completion dates. This renders BullsEye unable to make billing cycles for all lines and calls accurately. As a result, BullsEye is faced with the prospect of backbilling which it is not able to do in some cases. A first bill goes a long way to defining the

---

73 Illinois 271 Order at 303.
74 Illinois 271 Order at 304.
75 *BANY 271 Order* at ¶ 187.

relationship with a customer. If it is inaccurate or incomplete, the customer will frame a negative perception of the CLEC despite the fact that SBC was the cause. The dilatory order completion notices are particularly problematic given their direct impact on a CLEC's cash flow because it precludes its ability to begin billing in a timely manner.

WorldCom demonstrated how orders become "mysteriously lost" in Ameritech Illinois' OSS and are neither confirmed nor completed. When this occurs customers that chose a CLEC for local service either never receive that service or do receive the service but continue to be billed by Ameritech Illinois.[76] Missing order completion notices lead to both lost revenue and customer dissatisfaction for CLECs. The customer is either being billed by Ameritech Illinois or not being billed at all. In either case, the CLEC is left with the prospect of sending a bill to a customer for services rendered much earlier. The customer will either complain, refuse to pay, or disconnect service with the CLEC not knowing that Ameritech Illinois was the ultimate cause of the problem.

Forte provided documentation that 9% of the time it received a completion notice from Ameritech Illinois only to find out its customer did not have dialtone. This does not stop Ameritech Illinois from billing for the circuit even though the service has not commenced.[77] Erroneous order completion notices are not captured in applicable performance metrics because SBC will indicate it sent the notice on time regardless of the fact that it was erroneous.[78]

Staff noted that Ameritech Illinois also failed to send timely completion notices.[79] SBC even succeeded in getting the benchmark reduced, but still continued to miss the benchmark for

---

[76] Illinois 271 Order at 126.
[77] Illinois 271 Order at 265.
[78] Illinois 271 Order at 280.
[79] Illinois 271 Order at 288.

completion notices, and, in fact, it did not come close.[80] Ameritech Illinois failed to meet the defined benchmark for any of the three months for three of the four sub-measures reported for PM 7.1.[81] Ameritech Illinois is still continuing to miss the benchmark for PM 7.1-0.4 (Percent Mechanized Completions Returned Within One Day of Work Completion – LNP Only).[82] As Staff notes, the problems with the completion notices forces CLECs to expend precious time and resources to follow-up on orders. Such actions should not be necessary with a functional OSS.[83]

It is clear that SBC Midwest's OSS is still far from being checklist compliant. The fact that SBC cannot even get its temporary fixes to solve the problem for any sustained period of time demonstrates that there are still fundamental problems with SBC's OSS that pervade all stages of the system. SBC's OSS is therefore still not in compliance with Checklist Item 2.

4. Change Management Process

Change management is the process of planning, coordinating, monitoring, and communicating changes to the OSS interfaces. It standardizes the procedure by which a change is requested, and the process by which it is assessed for technical and business impact. Standards for review, assessment, approval, and scheduling processes are established. The objective of change management is to facilitate change while ensuring that standard methods and procedures are followed, thereby eliminating or minimizing possible negative impacts of the change on service level commitments.[84]

As the Commission noted in its *New York 271 Order*:

---

80 Illinois 271 Order at 288.
81 Illinois 271 Order at 288.
82 Application, Ehr Illinois Affidavit, ¶ 53.
83 Illinois 271 Order at 288.
84 Application, Joint Affidavit of Mark Cottrell and Beth Lawson Regarding Operations Support Systems, ¶

> The change management process refers to the methods and procedures that the BOC employs to communicate with competing carriers regarding the performance of and changes in the BOC's OSS system . . . . Without a change management process in place, a BOC can impose substantial costs on competing carriers simply by making changes to its systems and interfaces without providing adequate testing opportunities and accurate and timely notice and documentation of the changes. . . . [C]hange management problems can impair a competing carrier's ability to obtain nondiscriminatory access to UNEs, and hence a BOC's compliance with section 271(c)(2)(B)(ii).[85]

In evaluating whether a BOC's change management plan affords an efficient competitor a meaningful opportunity to compete, the Commission first assesses whether the plan is adequate. In making this determination, it assesses whether the evidence demonstrates: (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers; (2) that competing carriers had substantial input in the design and continued operation of the change management process; (3) that the change management plan defines a procedure for the timely resolution of change management disputes; (4) the availability of a stable testing environment that mirrors production; and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway. After determining whether the BOC's change management plan is adequate, the Commission evaluates whether the BOC has demonstrated a pattern of compliance with this plan.[86]

Prior to its Uniform Platform Release, SBC Midwest (former Ameritech) Region had functionality enabling it to "unreject" LSRs rejected improperly by SBC systems. SBC knowingly eliminated this functionality in the Uniform Platform Release. As a result, if SBC's systems erroneously reject an order, there is no way for Choice One to correct that automated (EDI or LEX) order, resubmit, and have the order accepted. SBC cannot bypass the erroneous system edit(s); therefore, the systems will continue to reject the order.

---

85 *New York Order*, ¶ 103.

86 *New Jersey Order*, Appendix C, ¶ 42.

Due to its inability or unwillingness to "unreject" invalid system rejects, SBC has established a manual process instead. In lieu of automated processing, this process requires a CLEC to submit, via fax, a non-barcoded manual order form that identifies the defect number associated with the invalid reject. This process increases a CLEC's workload by adding a manual process outside of the normal order submission process, and also reduces a CLEC's ability to track the impacted orders due to the fax submission requirement. Orders are easily lost and/or misplaced on the receiving end of the fax, with the submitting CLEC having very little ability to prove the order was originally sent. An end user's due dates and services can be negatively impacted.

Choice One, therefore, submitted. in June 2002, a CLEC Change Request, CCRAM02-011, which requested that SBC restore (for the former Ameritech Region) and/or establish (for the remainder of the SBC 13-State footprint) the functionality enabling SBC representatives to bypass invalid system rejects. SBC immediately dismissed the request, without investigation, stating that this functionality had knowingly been omitted. SBC contended that other SBC regions had not had the functionality previously, and the Uniform Platform Release would have far less defects than CLECs had experienced in the past. SBC's position was that it was a much more effective utilization of resources to "quickly" resolve defects, rather than to expend resources "unrejecting" individual orders. At the insistence of multiple CLECs, SBC agreed to defer the CCR until April 2003, following the next few releases, and begin to review again at that time. Thus, rather than strive to improve its OSS such that it can achieve "best" practices that have already been achieved in certain parts of its region, SBC would rather, in the name of uniformity, have its systems "evolve" to a lower standard of performance. Implicit in this

decision making is the obvious fact that manual workarounds will heighten the problems for CLECs.

Multiple discussions surrounding this topic took place monthly at the Change Management Process forum. As a partial compromise, a request was made for an ability to email rather than fax the forms. The request was ultimately rejected. There were also discussions pertaining to Performance Measures ("PM") that might be impacted by the change. CLECs believed that, at a minimum, PMs 5 & 9 would be impacted. SBC indicated Performance Measures were a discussion for another collaborative rather than Change Management.

After more than a year of debate, CCRAM02-011 was unceremoniously rejected by SBC at the July 10, 2003 Change Management Process forum. Choice One stated its displeasure with the rejection, as well as its lack of any sense of security with SBC's ability to "rapidly resolve defects" as continually promised. The bottom line is that Choice One invests significant amounts of time processing manual orders to resolve invalid system rejects of their orders. CLECs are paying the price for SBC's inability to deliver a "clean" release, as demonstrated by SBC's own Enhanced Defect Report.

SBC has repeatedly indicated that subsequent versions of LSOG releases would have fewer and fewer defects, and that SBC would "resolve rapidly" any defects. Choice One has found this not to be the case. As SBC's own Enhanced Defect Report demonstrates, Defect (DR) volumes have not decreased, and the speed with which SBC fixes defects has not improved either.

SBC's August 1, 2003 Enhanced Defect Report identifies 233 open defects, of which 143 (over 60%), impact the Midwest Region. This report includes defects dating from as far back as February 10, 2003, and covers all currently supported versions. There are 14 defects

documented as impacting all versions, 39 defects in Version 5.02, 97 defects in Version 5.03, 82 defects in Version 6.0, and 1 defect where no version is indicated.

Even with the substantial number of defects being reported, this is not the entire picture. Once a defect is investigated and found to require a Change Request (CR), the CR is written by SBC and becomes its internal tracking mechanism. At this point, the defect is removed from the EDR. Since SBC does not currently provide CLECs with any report and/or tracking capabilities with regard to those CRs, many currently unresolved defects are out of the sight of the CLECs, with indeterminate resolution dates. In addition, the report does not include those defects that are non-CLEC affecting.

The impact of these DRs, as well as any resulting CRs, is significant, and places an unwarranted burden on Choice One. While defect resolution is delayed for months, and perhaps years (with inclusion in the CR process), CLECs are forced to submit manual orders as "work arounds." This is obviously outside of normal ordering procedures, and costly to Choice One in terms of processing time, man-hour resources, due dates received, and relationships with end users. To make matters worse, SBC requires manual order submission be done via fax, an outdated technology, which eliminates CLEC tracking abilities and leaves orders open to being lost at the receiving end (Choice One has experienced this issue on multiple occasions). Choice One's repeated requests for email in lieu of fax processing have, in all instances, been refused.

Choice One initially requested email, in lieu of fax, for submission of manual order forms in conjunction with Invalid System Rejects via the Change Management Process Forum (CCRAM02-011, June 11, 2002). After extended debate surrounding the OSS portion of the issue, the request for email for manual orders was transferred to the All Regions CLEC User

Forum ("ARCUF") on May 29, 2003 as issue GCUF 03-037A ("Request Email in Place of Faxes for Manual Orders").

VarTec Communications submitted issue GCUF 02-011A, Proposed Change to Manual Order/Pre-Order Submission Process, to the ARCUF on September 20, 2002. The proposed change was also to replace faxing with email.

Birch Telecom submitted issue GCUF 03-012A requesting that the SBC (N)ew (CON)struction Address Form Process being utilized in the SBC Midwest Region be made a 13-State process. Since the appropriate forms were currently being emailed in the Midwest Region, the assumption was that the same would apply in the remainder of the 13-State footprint. However, when a process was returned to the ARCUF for discussion and comment, that was not the case. A process was detailed involving a telephone call by the CLEC to SBC's Local Service Center, in all regions except for the Midwest, which was to remain as is. When CLECs, including Choice One, pushed for a consistent, best practice, 13-State process, SBC's response was to move to a fax process for all regions.

All attempts by CLECs to move SBC to email, rather than fax, have consistently been rejected. SBC has indicated that it sees no benefit to itself to move to email rather than fax, and that it would be cost prohibitive since large sums of money have been invested in fax servers and associated automation to receive faxes on its end. CLECs continue to absorb the cost of antiquated faxing processes, including the cost of unnecessary time spent, wasted manpower resources, requested due dates not received, and end user expectations not met. Additionally, the great majority of faxing is due to "invalid system rejects" and/or DRs. In other words, CLECs are assuming the cost for SBC's coding issues.

CIMCO has encountered various issues since migrating to LSOR version 5.03 on June 13, 2003. SBC claims that CIMCO was one of several CLECs that "delayed" moving from LSOR 4.02 until immediately before its retirement.[87] One can understand the reluctance of CLECs to migrate to new versions of SBC's OSS given the attendant problems that occur. SBC notes that "[S]everal defects encountered by CIMCO were related to complex product ordering, the most critical of which were quickly resolved through implementation of an emergency release."[88] SBC Midwest defects were identified and SBC has posted these defects (including two defects prioritized as Severity 1) on its Enhanced Defect Report. SBC's OSS CLEC Support has been holding daily conference calls with CIMCO to address and resolve these issues.[89] It is not productive for either SBC or CIMCO to have to be conducting conference calls on a daily basis. If CIMCO was one of the later CLECs to migrate to version 5.03 one would have hoped that significant defects would have been worked out in SBC's new version by then. It is clear they were not. It is also clear that SBC did not eliminate or minimize possible negative impacts of the change on service level commitments.

Commenters believe SBC falls far short of being able to deliver a "clean" release to its wholesale customers (CLECs). Commenters concede that the goal of an error free release is simply that, a goal, and logically unattainable. However, the volumes of defects seen in each subsequent release since the Plan of Record Release, and the extended timeframes to resolve these defects, are a clear indication that SBC has not met its obligation in that regard.

SBC's inability to identify and resolve its own system issues causing "invalid system rejects," puts an undue burden on the CLEC to both uncover the issues, and "work around" them, outside of the normal automated processes. Additionally, SBC's steadfast commitment to the

---

87 Application, Cottrell/Lawson Affidavit at ¶ 159.

88 *Id.*

outdated technology of faxing, rather than emailing, in manual scenarios, creates inefficient processes and jeopardizes a CLEC's ability to set appropriate expectations with their end users.

Another regional best practice that Ameritech refuses to implement involves CLEC to CLEC conversions. In California, SBC has a seamless process for CLEC-to-CLEC customer migrations where circuit orders can be reused. Thus, orders can flow through. Likewise, in Illinois, the process of a CLEC-to-SBC Retail customer migration is seamless as well with only one order needed. For CLEC-to-CLEC customer migrations in Illinois, however, two orders are needed. The customer's new CLEC has to submit a LSR, and the old CLEC has to submit both a disconnect notice and confirm the new CLEC's LSR. This process has added weeks to the conversion process. Mpower has requested via the Change Management Process that the process SBC uses in California be implemented in the Ameritech region, but SBC has not done so. Once again, Ameritech's OSS is designed to give its retail division an advantage.

SBC must better fulfill its obligations prior to obtaining Section 271 authorization.

5. Loop Makeup Information

Mpower has had to cancel numerous DSL orders in Illinois due to erroneous loop makeup information it receives from SBC OSS. Mpower will prequalify a loop to determine if it meets its service standard, which is that if the loop is over 15,000 feet it will not provide DSL service on the loop. Mpower will order loops that SBC's OSS indicates are below 15,000 feet only to obtain loops that are longer than 18,000 feet and with equipment such as bridge tap or repeaters that will preclude use of the loop for DSL service. Mpower has had to cancel nearly 40% of its DSL orders in Illinois because of this. The expense involved is very significant as Mpower will market service to customers thinking that there are DSL-capable loops available only to find that there are not. Thus, Mpower incurs marketing and prequalification expenses

---

[89] Application, Cottrell/Lawson Affidavit at ¶ 161.

only to find that it cannot service the customer. The worst thing is having to convey to its potential customer that it cannot deliver the product it promised. In an industry driven by goodwill and reputation, the inability to deliver a promised product is highly prejudicial.

II. SBC'S END-AROUND OF THE RATE SETTING PROCESS TO OBTAIN HIGHER UNE RATES CREATES TREMENDOUS REGULATORY UNCERTAINTY IN ILLINOIS

A. **Legal Standard**

Checklist Item 2 of Section 271 states that a Bell Operating Company ("BOC") must provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of the Act."[90] Section 251(c)(3) requires LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . . ."[91] Section 252(d)(1) mandates that state commissions should determine just and reasonable rates for network elements that are nondiscriminatory and based upon the cost of providing the network element.[92] The Federal Communications Commission ("FCC" or "Commission") has determined that prices for unbundled network elements (UNEs) must be based on the total element long run incremental cost ("TELRIC") of providing those elements.[93]

B. Status of Illinois Pricing

On May 9, 2003, the Illinois legislature, pursuant to extensive lobbying by SBC, enacted sections 13-408 and 13-409 to the Illinois' Public Utilities Act. Section 408 instructed the ICC

---

[90] 47 U.S.C. § 271(B)(ii).

[91] 47 U.S.C. § 251(c)(3).

[92] 47 U.S.C. § 252(d)(1). The State Commissions may factor in a reasonable profit when basing rates upon costs.

[93] *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 16 (Apr. 16, 2001) ("*Verizon MA 271 Order*").

to institute a new proceeding to adjust UNE loop rates based on specific instructions contained in section 408. Section 408 instructed the ICC to adjust the UNE rates by June 9, 2003 by making changes to two criteria: fill factors and depreciation.[94] Specifically, the ICC was directed to use fill factors based on SBC's actual fill, as opposed to the fill of an efficient incumbent LEC. The ICC was also directed to base depreciation lives not on those of a hypothetical efficient ILEC but rather to employ the depreciation costs that SBC reports in its books of accounts as submitted to the SEC.[95] The required adjustments significantly increased UNE loop rates in Illinois. The rate for Access Area A increased from $2.59 to $5.12, the rate for Access Area B increased from $7.07 to $12.83, and the rate for Access Area C increased from $11.40 to $19.29.[96] The legislation stayed for two years the rate increase for the first 35,000 lines that a CLEC leases, but if the CLEC goes beyond this limit they would face immediate rate hikes.[97] CLECs already possessing line counts above 35,000 faced the rate hikes immediately.

The United States District Court for the Northern District of Illinois, Eastern Division, enjoined the ICC from implementing this legislation. The court noted that the legislation conflicted with federal law in several respects. First, the legislation directed the ICC to base fill factors and depreciation on SBC's actual practices and costs in violation of FCC Rule 51.505. As the court noted, "section 408 completely reads out the hypothetical efficient provider standard from TELRIC" and has "by fiat, rendered TELRIC irrelevant with respect to two key factors in the rate setting exercise."[98]

---

[94] *Voices for Choices, et al., v. Illinois Bell Telephone Co., Inc. d/b/a SBC Illinois, et al.*, No. 03 C 3290, slip op. at 6 (N.D. Ill. Jun. 9, 2003) ("*Voices for Choices*'), *appeals pending*, Nos. 03-2735 & 03-2766 (consolidated) (7th Cir.)

[95] *Voices for Choices* at 7.

[96] *See Illinois UNE Rate Legislation Order*, Appendix 1.

[97] *Voices for Choices* at 15.

[98] *Voices for Choices* at 9.

The court noted that the 1996 Act delegated the rate setting exercise to state public utility commissions. The court found the Illinois General Assembly particularly ill-suited to performing the rate-setting function given its lack of expertise and experience in rate-setting and the absence of procedural rights and safeguards that generally attend hearings before state commissions.[99] The court found that "a clear usurpation of authority took place here in a way neither authorized nor contemplated by the FTA when the Illinois Legislature decreed fill and depreciation rates, matters heretofore determined by the ICC."[100] The court noted that the 1996 Act delegated rate-setting powers to the state commissions, not to the states themselves.[101] The court added "not only does the Illinois legislation circumvent the arbitration procedure contemplated by the FCC, it actually abated just such an arbitration that was ongoing at the time the legislation was enacted."[102] In its place, the Illinois legislation decreed a "sham" ICC proceeding to set rates.[103]

The court went on to note that "having the issues resolved in their favor by the legislature rather than in an ICC arbitration allowed SBC to avoid its burden of proof under FCC regulation 51.505."[104] Under 51.505, SBC is required to demonstrate that its rates are TELRIC-compliant.

C. The Specter of the Illinois Legislation Precludes a Finding of Compliance with Checklist Item 2

It is clear from the language of the court's order that if the Illinois legislation was allowed to take effect, the resulting rates would not only not be TELRIC-compliant but run afoul of both the letter and spirit of the 1996 Act. It would undercut the rate-setting process established by the 1996 Act. Thus, there would be a de jure violation of Checklist Item 2 which

---

99 *Voices for Choices* at 10.
100 *Voices for Choices* at 10.
101 *Voices for Choices* at 11.
102 *Voices for Choices* at 13.

requires conformance to Section 252(d)(1) of the Act as implemented by the Commission. Obviously recognizing this, SBC makes no attempt to defend its actions in prodding the legislature to increase UNE loop rates or the rates that result. Instead, SBC contends that the Commission must simply judge its application based on the current rates and not based on rates that may go into effect.[105]

SBC cites as support for its position this Commission's treatment of pending rate proceedings in its *GA/LA 271* proceeding. There the Commission said that it did not believe that the existence of a new cost docket "without more," should affect its review of the currently effective rates that the RBOC submitted with its application. If ever there was a situation of "more" this is such a situation.[106] In fact, the factors that led the Commission in the GA/LA 271 proceeding to decline to consider the specter of new rates in that proceeding are not present here. First, the Commission noted that state commissions are always in the process of setting and reviewing rates.[107] In this case, however, the state commission is not the entity conducting the rate-setting, rather it is the legislature. SBC successfully convinced the legislature to bypass the state commission rate-setting process. Thus, this is by no means part of the routine rate-setting function, but an extraordinary, and as the court found, extra-legal event. The Commission also noted in the GA/LA 271 proceeding that while CLECs were concerned by the prospect of proposed rate increases, these proposed rates had not been put to the test in the evidentiary hearings where they will face challenge by CLECs and the scrutiny of the state commission.[108] If SBC succeeds on its appeal, however, the rate increases will be a reality, and what is worse,

---

103 *Voices for Choices* at 13.
104 *Voices for Choices* at 13.
105 Application at 49.
106 *GA/LA 271 Order*, ¶ 96.
107 *Id.*
108 *GA/LA 271 Order*, ¶ 98.

they will be implemented without any evidentiary hearing, without opportunity for challenge by CLECs, and without the scrutiny of the state commission. The Commission placed confidence in the Georgia Commission to resolve pricing disputes, ensure cost-based prices, and protect competition.[109] The Illinois Commission, however, has had this role usurped, so the same confidence cannot be placed with it. In fact, in implementing rates compliant with the legislation, the Illinois Commission noted that the General Assembly "intended to limit our initial review of the rates subject to Section 13-408" and that the legislation dictated a time frame that is "insufficient to conduct a detailed investigation and review of the model inputs at issue."[110] Finally, in the GA/LA 271 proceeding, the Commission noted that CLEC concerns about new rates were "premature, speculative, and misplaced."[111] Here there is no premature or speculative concern. The rates have been set by the Illinois Commission. But for the grace of the federal court, these rates would be in effect.

The Commission must not turn a blind eye to the specter of the Illinois legislation as SBC asks it to do. The stay of the legislation's effects does nothing to eradicate the fact that basic principles central to TELRIC and the Act itself were violated by the legislature and the Illinois Commission at the behest of SBC. Even with the legislation being enjoined, CLECs will operate in Illinois under tremendous uncertainty until the appeal is resolved. CLECs are not assured that there will continue to be TELRIC-compliant rates in Illinois and CLECs cannot place any trust in the state ratemaking process to ensure that there will be TELRIC-compliant rates in the future.

---

109 *GA/LA 271 Order*, ¶ 98.

110 *Petition to Determine Adjustment to UNE Loop Rates Pursuant to Section 13-408 of the Illinois Public Utilities Act*, Illinois Commerce Commission Docket No. 03-0323, Order at 13 (June 9, 2003).

111 *GA/LA 271 Order*, ¶ 99.

The Commission must receive an assurance from both SBC and the Illinois Commerce Commission that its pricing rules and the pricing requirements of the Act will be adhered to, and that there will be no further circumvention of the rate-setting process established by the 1996 Act, as implemented by the Commission. Without such a commitment, SBC cannot be found to be in compliance with Checklist Item 2.

D. Interim Rates Heighten the Regulatory Uncertainty CLECs Face In Illinois

Vital UNEs, such as dark fiber, subloops, and CNAM database, are still subject to interim rates in Illinois.[112] Staff also highlighted major concerns about the rates. Staff notes that there were discrepancies between the subloop rates and loop rates including instances where the subloop rate was higher than the rate for the entire loop itself. There were also major discrepancies between the line conditioning charges for subloops and those for loops. Most troubling, however, was the fact Staff believed that the underlying cost model used to develop dark fiber and subloop rates was not TELRIC-compliant.[113] AT&T noted that Ameritech Illinois's CNAM rates were far higher than rates in other states such as New York (New York rates were 1/100th of the Ameritech Illinois rate). Staff found that Ameritech Illinois' rates for subloops, dark fiber and the CNAM database are higher than rates for the same elements in the Ameritech Michigan region (which has a comparable rate structure) in 73% of the instances, and that in Michigan the subloop rate is always lower than the corresponding loop rate.[114] In one case, the dark fiber rate was 1,385% higher in Illinois than the corresponding rate in Michigan.[115]

---

[112] Application, Affidavit of W. Karl Wardin on Behalf of Illinois Bell Regarding Illinois Pricing of Unbundled Network Elements and Interconnection, ¶¶ 53-54 (2003).

[113] Illinois 271 Order at 134.

[114] Illinois 271 Order at 165.

[115] Illinois 271 Order at 209.

The FCC first addressed the issue of interim rates in its *BANY 271 Order* and created a limited exception for use of interim rates. The Commission noted:

> [w]e believe that this question should be addressed on a case-by-case basis. If the uncertainty caused by the use of interim rates can be minimized, then it may be appropriate, at least for the time being, to approve an application based on the interim rates contained in the relevant tariff. Uncertainty will be minimized if the interim rates are for a few isolated ancillary items, permanent rates that have been established are in compliance with our rules, and the state has made reasonable efforts to set interim rates in accordance with the Act and the Commission's rules.[116]

In this case, the interim rates do not cover a few isolated ancillary items, but instead cover three significant UNEs. Moreover, these interim rates have not been investigated by the Illinois Commission and Staff suspects that they are not TELRIC-compliant. In addition, the Illinois legislation, if validated, may be extended to these rates as well. The legislation states that it is limited to "unbundled loops" but there are dark fiber loops and subloops are part of loops. Thus, it is not clear if the Illinois Commission will apply the same "actual" fill factors and depreciation factors to the dark fiber and subloop rates or whether it will use TELRIC-compliant inputs. Far from having uncertainty minimized, the use of the interim rates only heightens the existing uncertainty by creating the very real prospect more Illinois rates will not be cost-based.

III. SBC'S UNTIMELY LOOP PROVISIONING VIOLATES CHECKLIST ITEM 2

There are three ways that an ILEC can provision unbundled loops to the CLEC. First, when the BOC does not serve the customer on the lines in question, the CLEC may obtain a "new" loop from the BOC. Second, the BOC may provision stand-alone loops to competing carriers through coordinated conversions of active loops to the carrier's collocation space. This

---

[116] *BANY 271 Order* at ¶ 258.

process is known as a "hot cut." The third option is provisioning the loop as part of a platform of network elements.[117]

The Commission has found that Average Installation Interval data is critical to determining if "a BOC provides equivalent access to OSS because such data are 'direct evidence of whether [a BOC] takes the same time to complete installations for competing carriers as it does for [itself], which is integral to the concept of equivalent access.'"[118] The Commission has noted the importance of the average interval in evaluating a BOC's provision of xDSL-capable loops. The Commission has held that "we would expect a BOC to demonstrate, preferably through the use of state or third-party verified performance data, that it provides xDSL-capable loops to competitors either in substantially the same average interval in which it provides xDSL-capable service to its retail customers or in an interval that offers competing carriers a meaningful opportunity to compete."[119]

The average provisioning interval must be evaluated in the light of data detailing missed due dates. The Commission has previously suggested consideration of the average completion interval in context with missed due dates because in some circumstances the completion interval may not be, on its own, an accurate indicator of whether a BOC is providing loops in a timely manner.[120]

Staff noted that Ameritech Illinois' installation intervals for stand-alone DSL loops (without conditioning) to CLECs was much longer than those for its retail affiliate. For CLECs,

---

117 *BANY Order*, ¶ 276.

118 *Id.* at ¶ 193.

119 *BANY Order*, ¶ 335.

120 *Id.* at ¶ 289.

in the months of September, October, and November, the average installation interval was 4.90, 5.03, and 4.87 days respectively.[121] For Ameritech's retail affiliate, the intervals were 0.67, 3.00, and 1.00 days respectively. In September and November, Ameritech met customer due dates for its retail affiliate 100% of the time, while for those same two months, it met due dates for CLECs, 98.9% and 98.27% of the time. In September, November, and December, Ameritech missed no due dates due to lack of facilities for its retail affiliate, but missed due dates 0.80%, 0.89%, and 0.76% of the time for CLECs.[122] Recent performance data also shows that Ameritech Illinois is missing the benchmark for installation intervals for line shared loops.[123] Thus, its performance still is not at parity.

Ameritech Illinois' performance was also problematic for voice grade loops. For the three months ending in November, 2002, Ameritech failed to meet parity criteria for PMs 66-01.1, 55-01.2, and 55.01-3, three of the eight times parity criteria were evaluated. Ameritech missed parity criteria for meeting non-standard customer requested due dates one out of six times parity criteria were evaluated. In September, 2002, missed due dates caused a delay in provisioning of CLEC service, measured by sub-measure 62-03, that was much longer than missed due dates caused delays for its retail affiliate.[124] Ameritech Illinois has also been missing the benchmark for average installation interval – UNE DS1 loop.[125]

The fact that Ameritech Illinois is missing both average installation intervals and missed due date benchmarks for a broad variety of loops suggest there are fundamental problems with its provisioning. Installation intervals and missed due dates are crucial to customers, particularly

---

[121] Ameritech Illinois' latest performance data still show an average installation interval of 4.76 days for CLEC orders. Application, Ehr Illinois Affidavit, ¶ 74.

[122] Illinois 271 Order at 444-445.

[123] Application, Ehr Illinois Affidavit, ¶ 77.

[124] Illinois 271 Order at 455.

new ones. A delayed installation will impact CLECs very significantly especially if the performance is out of parity with Ameritech's retail division. The Commission should require a demonstration of sustained compliance in this area before finding checklist compliance.

IV. SBC DOES NOT MEET PARITY REQUIREMENTS IN REGARD TO CHECKLIST ITEM 4

Section 271 requires a demonstration that the SWBT "is providing" and has "fully implemented" each item on the Competitive Checklist. In order to satisfy Item 4 of the Competitive Checklist, a BOC must show that the quality and timeliness of loops provisioned to CLECs is substantially the same for the BOC's provision of its own retail advances services or that the level of quality is sufficiently high so as to permit CLECs a meaningful opportunity to compete.[126] In addition to failing to meet many of the performance and parity standards set out within checklist Item No. 4, SBC's failure to provide nondiscriminatory access to unbundled DS1 and DSL loops has hindered and, in many cases, prevented CLECs from having the opportunity to compete with SBC on an equal footing.

Mpower attaches as Exhibit A to these Comments a chart it has prepared that tracks the trouble rate it, and other CLECs, have experienced in regard to DS1 loops and DSL loops. The data is based on performance data Ameritech Illinois has reported from April 2002 to May 2003. As the chart demonstrates, Ameritech Illinois' trouble rate for DS1 loops has generally been far below the trouble rate for Mpower and the trouble rate for all CLECs. For DSL loops, Mpower's trouble report rate has been higher than Ameritech Illinois for the months of July 2002 to March 2003 and from April to May 2003. The data for all CLECs demonstrates a lack of parity from November 2002 to March 2003 with, of course, the expected pre-FCC application improvement

---

[125] Application, Ehr Illinois Affidavit, Illinois Performance Measures Hit or Miss Report, Attachment B, p. 15.

on the part of Ameritech. CLECs using these facilities to provide vital voice and data services are greatly hampered by the heightened incidence of trouble they encounter on these circuits. SBC's performance is inherently anticompetitive as it can, and does, trumpet its superior facility quality to customers all the while miring CLECs in a sea of trouble reports.

To compound the situation, Ameritech Illinois erroneously charges CLECs maintenance and repair trip charges. Before submitting a trouble report, Mpower will check its own facilities to ensure the problem is not on its end. It then submits the trouble report and Ameritech sends out a technician. The technician will detect the problem in Ameritech's facilities, fix the problem, and then close it out as a customer premises problem. This means that Ameritech is claiming the problem is on Mpower's end despite the fact that the problem was with Ameritech's facilities. Ameritech Illinois LSOC managers have admitted to Mpower during weekly operational review meetings that Ameritech does not test the entire circuit every time before closing out a problem as a customer premises problem.

This practice is of huge significance as Ameritech will bill Mpower a trip charge for the repair even though the problem was Ameritech's fault. Ameritech also mistakenly bills Mpower for dispatches to other CLECs. As a result, Mpower has to painstakingly audit the circuit identifications on every bill to ensure that the circuits are actually Mpower circuits. Thus, Mpower is not only getting inferior facilities, but paying a higher cost to maintain them. Once again, this gives Ameritech a tremendous competitive advantage.

Finally, in regard to loops, Mpower notes that SBC appears to have two facilities provisioning policies. If it has a Section 271 application pending, as it does now in the Ameritech region, and as it did in places like California and Texas, if a facility a CLEC has

---

126 *New York Order*, para. 335.

ordered needs additional equipment such as a line card or repeater, Ameritech will add it at no additional charge. Once Section 271 authority is obtained, such as in Texas and California, a "no facilities" policy is implemented. This means that facilities needing additional equipment are rejected on a "no facilities available" basis. A CLEC would have to order the facility out of SBC's special access tariff. If the same customer, however, requests the same facility from SBC's retail division it is provided with no special construction charges. As this Commission announced in a February 20, 2003 press release regarding its Triennial Review of network unbundling obligations under the Telecommunications Act of 1996, ILECs are required to make "routine network modifications" to existing loop facilities and "undertaking the other activities that incumbent LECs make for their own retail customers." Yet SBC engages in these discriminatory policies once it obtains Section 271 authority. One can imagine that CLECs would face the same reality in the Ameritech region if SBC obtains Section 271 authority.

V. SBC'S APPLICATION IS NOT IN THE PUBLIC INTEREST

A. The Legal Standard

Section 271(d)(3)(C) of the Act directs that the Commission shall not give Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."[127] This public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.[128] The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission "in evaluating Section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications

---

127 47 U.S.C. § 271(d)(3)(C).

128 *See* 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

Act."[129] As a Senate Report noted, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."[130] The Report went on to add that "in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC'S decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services."[131]

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. The Commission noted that under the standard it was given "broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."[132] The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.[133] The Commission explicitly recognized that "Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority."[134]

Predictably, the RBOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has

---

[129] *In the Matter of the Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298, ¶ 385 (1997) ("*Ameritech Michigan 271 Order*").

[130] *Id.* at n. 992, *quoting,* S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

[131] *Id.*

[132] *Ameritech Michigan 271 Order* at ¶ 383.

[133] *Id.* at ¶ 385.

[134] *Id.*

implemented the competitive checklist.[135] BellSouth also contended that the Commission's responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.[136] The Commission rejected both of these claims and reaffirmed that it will consider "whether approval of a Section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."[137] The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the "BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition."[138] As the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company ("BOC") should be permitted only when the local markets in a state have been "fully and irreversibly" opened to competition.[139]

The importance of the public interest standard was reaffirmed in 2001 by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.[140] In that letter the Senators stated:

> [t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive

---

[135] *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana,* CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 361 (1998).

[136] *Id.*

[137] *Id.* Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Ameritech Michigan 271 Order* at ¶ 389.

[138] *Ameritech Michigan 271 Order* at ¶ 386.

[139] *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania,* CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

[140] Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*").

> carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.[141]

The Staff of the Illinois Commerce Commission correctly interpreted the public interest standard as holding that the "existence of a pattern of discriminatory conduct or regulatory violations" would militate against a grant of Section 271 authority.[142] Staff's view was that "Ameritech Illinois has compiled precisely such a history in its refusal to comply with this Commission's orders relating to competition."[143] Staff noted a history of "regulatory non-compliance" on the part of Ameritech.[144] The following is but a sample of the anti-competitive conduct that Ameritech has used to keep the doors of competition closed in the Midwest Region.

B. SBC Has Denied Competitors' Access to DLC Loops

The Illinois Commerce Commission Staff has observed that Ameritech elects to interpret its unbundling obligations narrowly, and that items that may be on this Commission's list of UNEs may be treated by Ameritech as though they are not on the list.[145] A classic example of this is loops served by digital loop carriers ("DLC"). Commenters understand that the Commission may be altering unbundling obligations in regard to DLC facilities in the Triennial Review Order, but the point Commenters want to emphasize is that CLECs have not enjoyed unbundled access to these facilities despite Commission pronouncements that such access should be provided up to this point. CLECs have been denied access to both integrated digital loop carrier ("IDLC") facilities and now next generation digital loop carrier facilities ("NGDLC"). Denial of access to these facilities provided a significant competitive advantage to Ameritech such that they could obtain a tremendous head start in the voice/data market and now these

---

141 *Id.* at 3.
142 Illinois 271 Order at 774.
143 Illinois 271 Order at 274.
144 Illinois 271 Order at 774.
145 Illinois 271 Order at 129.

advantages will be cemented with the lifting of unbundling obligations in regard to these facilities.

Project Pronto is perhaps the prototype of NGDLC network investment. This investment was sold to SBC's investors as something that not only would allow for the greater deployment of DSL, but that would produce savings in operating costs for current services and savings on future facilities expansion.[146] Provision of voice service is also an integral part of the Project Pronto offering. Project Pronto has spurred a rapid deployment of SBC services. In a January 24, 2002, "Investor Briefing" SBC announced that it had expanded its DSL-capable footprint by 37% in 2001 and that it had the "industry's largest DSL Internet customer base."[147] SBC's public pronouncements regarding data services provided to enterprise customers were equally glowing. SBC announced growth for data services of between 14.4% and 27.9% in 2001 and 16.9% in the fourth quarter of 2001 for high-speed data transport services.[148] It was expected that 80% of Ameritech's customers will be served by Project Pronto by the end of 2002.[149] The economic downturn forced SBC to scale back some of this deployment, but clearly it anticipates this network architecture as its future. While SBC was making increased use of these DLC facilities it was doing all in its power to limit CLEC access to the facilities.

The Commission was prescient in determining in its *Local Competition Order*:

> [w]e further conclude that incumbent LECs must provide competitors with access to unbundled loops regardless of whether the incumbent LEC uses integrated

---

[146] Robert E. Hall and William H. Lehr, *Promoting Broadband Investment and Avoiding Monopoly,* at 12 (Feb. 21, 2002).

[147] SBC Investor Briefing No. 228, http://www.sbc.com/investor_relations/financial_and_growth_profile/investor_briefings/1,5869,253,00.html, at 2 and 5 (Jan. 24, 2002) ("SBC Fourth Quarter Briefing").

[148] SBC Second Quarter Briefing, at 4; SBC Third Quarter Briefing, at 4; SBC Fourth Quarter Briefing, at 4.

[149] *In the Matter, on the Commission's own motion, to consider the total service long run incremental costs for all access, toll, and local exchange services by Ameritech Michigan*, MI PSC Case No. U-11831, Opinion and Order, at 2 (May 3, 2000).

> digital loop carrier technology, or similar remote concentration devices, for the particular loop sought by the competitor. IDLC [Integrated Digital Line Carrier] technology allows a carrier to aggregate and multiplex traffic directly into the switch without first demultiplexing the individual loops. If we do not require incumbent LECs to unbundled IDLC-delivered loops, end users served by such technologies would not have the same choice of competing providers as end users served by other loop types. Further, such an exception would encourage incumbent LECs to "hide" loops from competitors through use of IDLC technology.[150]

At the time, the Commission was referencing IDLC technology which in the intervening years has evolved into the next generation DLC technology. The Commission in its *UNE Remand Order* restated its finding as to unbundling IDLC loops, but noted at the time that CLECs were not yet able "economically to separate and access IDLC customers' traffic on the wire-center side of the IDLC multiplexing devices."[151] The NGDLC technology, however, has made such access technically and economically feasible. In fact, SBC would not be able to offer the Broadband Service Offering if CLECs were not able to access voice and data traffic on the wire-center side of the DLC devices. There, the Commission clearly contemplated that the DLC technology constituted part of the unbundled loop, and that failing to require unbundled access to such loops would limit the choice of providers for end users served by the technology.[152]

The situation this Commission predicted has come to fruition. The increasingly prevalent use of IDLC technology has frozen many end users on the ILEC network by impeding the access of competitive local exchange carriers to such customers. In addition, customers of the CLECs

---

[150] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 96-325, First Report and Order, 11 FCC Rcd. at 15499 at ¶ 383 (1996)("*Local Competition Order*").

[151] *In the Matter of the Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, at ¶ 217, fn. 418 (1996)("*Local Competition Order*")

[152] Market forecasts project that over half the U.S. telephone subscribers will be served by remote terminals within the next three years. CC Docket Nos. 98-147 and 96-98, Comments of Catena at p. 3 (October 12, 2000)("*Catena Comments*").

are being denied the benefits of such technology by ILEC attempts to "hide" such loops from competitors.

The problem of CLEC access to fiber loops is not limited to the SBC's Project Pronto architecture. CLECs experienced access problems to Ameritech's IDLC systems as well. For instance, as a routine matter under its tariff, Ameritech declared that loops served by an IDLC were "unavailable."[153] Thus an ILEC customer currently being served by an IDLC loop who chooses to get service from a CLEC using unbundled ILEC loops could not stay on the IDLC loop; instead, the customer's service would have to be put onto an analog loop (spare or retired copper loop or a UDLC).[154] There were two purported non-discriminatory bases for this policy. One, ILECs would state that there were "no spare loops" available. Staff of this Illinois Commerce Commission found this assertion particularly troubling as Ameritech's fiber utilization rates are typically 33% and its cost and engineering guidelines are designed to avoid instances where facilities are exhausted.[155] Thus, "no spare loops" should rarely be a basis.

The other purported basis was that it was technically unfeasible to unbundle the IDLC because the traffic goes straight to the digital switch. There are, however, no technical impediments to a customer receiving service from a CLEC via an unbundled ILEC IDLC loop.[156] In situations where a loop was "unavailable," the CLEC had to determine if it wanted the ILEC to make some alternative arrangements such that the particular customer could be serviced. This required making a "Bona Fide Request" ("BFR") for a loop. The CLEC was

---

[153] *Investigation of Construction Charges*, Illinois Commerce Commission Docket No. 99-0593, Hearing Examiner's Proposed Order, p. 18 (June 12, 2000)("*Illinois Special Construction Order*").

[154] MCI WorldCom, *Unbundling Digital Loop Carriers* at 10 (March 1999)("*Unbundling DLC*").

[155] *Illinois Special Construction Order*, p. 13.

[156] *Unbundling DLC*, p. 10. For instance, in facilities where a LiteSpan DLC is used, loops can be unbundled from the IDLC. *Illinois Special Construction Order*, p. 10.

required to either submit a non-refundable deposit of $2,000 or agree to pay whatever the costs Ameritech incurred to prepare the preliminary analysis.[157] This does not guarantee that the CLEC will get the UNE as the ILEC may at end of the analysis determine that no alternative arrangement can be made.[158] If an alternative arrangement is available, the CLEC may still have to incur special construction charges for the alternative arrangement.[159] The BFR process itself could take up to four months.[160] One CLEC determined that 15% of its unbundled loops that it ordered had been impacted by special construction charges or BFRs.[161] What was worse, there were examples where Ameritech Indiana informed the CLEC "that special construction was required to install service, but similar charges were not assessed to the same customer once that customer chose to take retail service from Ameritech Indiana."[162] Even after paying the costs of the BFR and the special construction charges, and enduring the months to provision the loop, the product the CLEC is getting, a non-integrated loop, is not the same as the IDLC loop that the ILEC has.

This already bleak situation for CLECs is compounded by the fact that Ameritech's unbundled loop costs were overstated because the cost studies that developed those rates are based on a model mixing two different network architectures – a 100% copper facility for shorter

---

157 *Illinois Special Construction Order*, p. 7.

158 *Id.*

159 *Id.*

160 *Id.*

161 *In the Matter of the Complaint of McLeodUSA Telecommunications Services, Inc. Against Indiana Bell Telephone Company Incorporated, d/b/a Ameritech Indiana, Pursuant to the Provisions of I.C. §§ 8-1-2-54, 8-1-2-68, 8-1-2-103, 8-1-2-104 Concerning the Imposition of Special Construction Charges*, Indiana Utility Regulatory Commission Cause No. 41570, Order at pp. 5-6 (June 28, 2000).

162 *Id.*

loops and UDLC technology for longer ones.[163] Ameritech meanwhile utilizes the lower cost, high efficiency IDLC technology for its customers and bases its rates for bundled loops to retail customers on such a model.[164] Compounding this denial of access to the state-of-the-art technology, the special construction charges being assessed are to move the loop from an IDLC to an UDLC system.[165] Thus, Ameritech was denying them non-discriminatory access to their lower cost, more efficient IDLC architecture, and charging them higher rates for a less-efficient architecture and tacking on special construction charges to make the non-integrated loops they purchase compatible with IDLC network.

Is it any wonder that the Staff of the Illinois Commerce Commission determined that allowing ILECs to impose their own definitions as to availability of loops served by IDLC facilities "allows it unilaterally alter its obligation to provide unbundled loops" and provides ILECs an "incentive to interpret this term ["available"] in ways that limit its obligation to provide UNEs."[166] The Commission was 100% right in predicting how not requiring ILECs to unbundle IDLC-delivered loops would limit the carrier choice of end-users served by such loops and allow ILECs to hide loops.

The Illinois Commerce Commission conducted an exhaustive proceeding that addressed many of the issues raised by NGDLC facilities. The Illinois Commerce Commission reached the following conclusions:

> [t]his proceeding had compiled a thorough analysis of the FCC's *Project Pronto Order* and concludes the following: a) the FCC's *Project Pronto Order* does not

---

163 *Illinois Special Construction Order* at p. 45-46.

164 *Id.*

165 *Id.*

166 *Id.* at p. 13.

> preempt, or otherwise prevent, this Commission from ordering line sharing over the Project Pronto architecture or identifying Project Pronto components as UNEs; b) it is technically feasible to unbundle the elements of the Project Pronto architecture; c) line sharing over the Project Pronto architecture is technically feasible; d) Project Pronto unbundling is not precluded by the FCC's exception of unbundled packet switching; e) the appropriate analysis in this case is the "impair" standard because no claim has been made that the Project Pronto architecture or its components are proprietary; f) line sharing over Project Pronto, and the unbundling of the Project Pronto network, satisfy the "impair" standard; g) the Project Pronto network should be unbundled and its elements offered to CLECs at just and reasonable rates as UNEs; h) Ameritech-IL must allow CLECs to virtually collocate line cards at RTs with NGDLCs, including RTs in the Project Pronto network; and I) the FCC has recently confirmed that nothing in the Line Sharing Order should be read as precluding a state commission from ordering line sharing over a system in which fiber has been deployed.[167]

Despite this ruling, emanating from a proceeding that took nearly a year to be resolved and involved multiple rounds of briefing and exceptions and rehearing,[168] Ameritech still precluded competitive access to the next generation loop architectures deployed by ILECs. AT&T notes that Ameritech still refuses to provide carriers with unbundled loops provisioned using Project Pronto technology.[169] In addition, Ameritech interprets its obligations under the ICC Orders as that it is only required to provide access to the high frequency portion of NGDLC loops.[170] This places CLECs at a significant disadvantage to Ameritech because a CLEC would have to purchase a separate voice loop to offer a package of voice and data services to a customer while Ameritech could provide the same services over one Project Pronto loop. Thus, CLECs lose out on the cost efficiencies that this architecture provides.

---

[167] *IL Line Sharing Order* at p. 30.

[168] *See Petitions for Covad Communications Company and Rhythms Links, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Amendment for Line Sharing to the Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, and for an Expedited Arbitration Award on Certain Core Issues*, Illinois Commerce Commission Docket Nos. 00-0312 and 00-0313, Arbitration Decision on Rehearing (Feb. 15, 2001); *Illinois Bell Telephone Company Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service*, Illinois Commerce Commission Docket No. 00-0393, Order on Second Rehearing (March 28, 2002).

[169] Illinois 271 Order at 391.

[170] Illinois 271 Order at 391.

What is worse, Ameritech Illinois did not conform its Broadband Service Offering in Illinois even to its "narrowed" interpretation of the ICC's ruling. As AT&T notes, Ameritech Illinois was required to bring its tariff language in compliance with the language of the ICC's Order in Docket No. 00-0393, but there were over 60 discrepancies in language, 25 instances where Ameritech omitted language it was required to mirror, 15 instances where Ameritech simply changed the language it was required to mirror, and 20 instances where Ameritech inserted new language that did not exist in the language it was intended to mirror.[171] These changes further limited CLEC access to the Project Pronto architecture such as limiting the ability of a CLEC to provide voice service over the architecture.[172] The Illinois Commission noted that AT&T raised "a matter of grave concern" in regard to Ameritech's non-compliance with the Commission's Order.[173]

The Broadband Service Offering is the tangible manifestation of what this unbundled NGDLC loop offering should look like. In that offering, SBC offers access to a:

> combined network arrangement consisting of: copper facilities from the NGDLC device deployed in remote terminal sites (includes CEVs, huts, and cabinets) to the end user location; a permanent virtual circuit that consists of ATM data transported over a common OC-3c fiber facility from the NGDLC in the remote terminal terminating on the central fiber distribution frame and delivered to a leased affiliated or unaffiliated telecommunications carrier port on the SBC/Ameritech incumbent LEC's OCD in the serving wire center; and a port on the SBC incumbent LEC's OCD with associated cross-connects to extend the port to a point of affiliated or unaffiliated telecommunication carrier virtual or physical collocation.

There is no dispute as to whether CLEC access to NGDLC loops via such offerings as the Broadband Service Offering should be provided, and there should be no question whether it should be provided on an unbundled basis pursuant to Section 251(c). We have already

---

171 Illinois 271 Order at 392.

172 Illinois 271 Order at 392-393.

demonstrated that this Commission has required DLC loops to be provided on an unbundled basis. In fact, SBC seemed to be of the same opinion, at least initially. In its original iterations of its Broadband Service Offering, SBC was planning to offer it as an unbundled network element, but a few months later performed an about-face and decided to offer it as a "wholesale" offering.[174]

While SBC offers end-to-end loop access to NGDLC loops as a "voluntary" offering in connection with Project Pronto, it does not do so at UNE-based prices.[175] Essentially CLECs were given the opportunity to resell Project Pronto end-to-end loops.[176] These offerings are not a viable alternative as Commission noted in the UNE Remand Order. In that Order, the FCC stated,

> We assign little weight in our "impair" analysis to the ability of a requesting carrier to use the incumbent LECs' resold or retail tariffed services as alternatives to unbundled network elements. In the *Local Competition First Report and Order*, the Commission expressly rejected the incumbent LECs' argument that requesting carriers are not impaired in their ability to provide service if they can provide their proposed service by purchasing the service at wholesale rates from the incumbent LEC. [177] As the Commission concluded in that Order, allowing incumbent LECs to deny access to unbundled elements solely, or primarily, on the grounds that an element is equivalent to a service available at resale would lead to impractical results; incumbent LECs could completely avoid section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail

---

[173] Illinois 271 Order at 415.

[174] *In the Matter of Application of Ameritech Michigan for approval of cost studies and resolution of disputed issues related to certain UNE offerings*, Michigan Public Service Commission Case No. U-12540, Cross-Examination Testimony of John P. Lube of Ameritech Michigan at pp. 589-592 (MI PSC Oct. 24, 2000).

[175] *In the Matter of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission Rules*, CC Docket No. 98-141, ASD File No. 99-49, Second Memorandum Opinion and Order, FCC 00-336 (Sept. 8, 2000).

[176] *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5,22,24,25,63,90,95 and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (rel. Oct. 8, 1999)("SBC/Ameritech Merger Order"); Second Memorandum Opinion and Order, FCC 00-336 (rel. Sept. 8, 2000) ("Project Pronto Order").

[177] *UNE Remand Order* at ¶ 67.

> services. [178] In other words, denying access to unbundled elements on the grounds that an incumbent LEC offers an equivalent retail service could force requesting carriers to purchase, for example, an unbundled loop and switching out of an incumbent's retail tariff at a wholesale discount, subject to all of the associated tariff restrictions. US West maintains that it need not unbundle local transport because requesting carriers can purchase its tariffed special access services. [179] In light of the little weight we assign to the availability of resold services in our analysis, we reject US West's argument.[180] This argument would foreclose competitive LECs from taking advantage of the distinct opportunity Congress gave them, through section 251(c)(3), to use unbundled network elements. [181]

Even though Ameritech's broadband wholesale offerings may not be specifically tariffed, this FCC determination applies to it because it is just that - a general wholesale resale offering. The FCC further explained in the UNE Remand that general offerings, such as Ameritech's wholesale offering, are not viable alternatives to the incumbent LEC's unbundled network element because "competitors would have no assurance that the incumbent LEC would not change the [offering] in such a manner that the competitive LEC could no longer rely on it to provide the services it seeks to offer."[182]

This is not the only instance where Ameritech has limited CLEC access to UNEs. Despite agreeing to offer shared transport to CLECs for intraLATA toll as a condition of the SBC/Ameritech merger, Ameritech refused shared transport for such a purpose to two CLECs.[183] In fact, this was a made a condition of the merger because prior to the merger Ameritech refused

---

178 *UNE Remand Order* at ¶ 67.

179 *UNE Remand Order* at ¶ 67.

180 *UNE Remand Order* at ¶ 67.

181 *UNE Remand Order* at ¶ 67.

182 *UNE Remand Order* at ¶ 69.

183 *CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC Communications, Inc.*, File No. EB-01-MD-017, Memorandum Opinion and Order, FCC 03-83, ¶¶ 20-21 (April 17, 2003) ("*Shared Transport Order*").

to provide shared transport for *any* purpose.[184] As Illinois Commission Staff notes, only recently did Ameritech begin to provide shared transport in compliance with its unbundling obligations.[185] The Commission found that Ameritech violated the merger conditions and, in so doing, engaged in an unjust and unreasonable practice under the Act.[186]

SBC/Ameritech should not be rewarded for its denial of access to vital UNEs. This is not conduct that evidences an intent to open markets "fully and irreversibly" to competition, and suggests that once Section 271 authority is obtained, access to vital UNEs will be even more difficult. The prejudice to CLECs in regard to lack of access to DLC facilities is particularly palpable because given the Commission's planned modification of unbundling requirements for these facilities. Thus, CLECs are losing access to an UNE they were never given a chance to utilize. The incentive to SBC is clear – resist your unbundling obligations as long as you can and you likely will be rewarded.

Clearly, as noted above, SBC has used its limitation of access to DLC facilities to its significant competitive advantage. It has gained a tremendous competitive advantage in the Midwest market, and now with the easing of unbundling obligations, it can cement these advantages. Ultimately, consumers will suffer from this lack of competition. In fact, they already are, since in October 2001, SBC raised its wholesale prices for DSL services by approximately 15% (while admitting that its cost to provide DSL connectivity was declining). SBC can do this because it retains monopoly control over the vital DLC facilities.

C. SBC's End-Around of the Illinois Commission Does Not Bode Well for the Illinois Marketplace

---

184 *Id.*, ¶ 24.

185 Illinois 271 Order at 774.

186 *Shared Transport Order.*, ¶ 25.

The Illinois Commission should be commended for its proactive stances on certain issues such as attempting to facilitate CLEC access to Project Pronto and implementing TELRIC-compliant rates (at least until recently). The Illinois Commission's reward, however, was to have its authority significantly curtailed by the legislature, explicitly in regard to rate-setting, and implicitly in other contexts. Regardless of the outcome of SBC's appeal of the federal court's enjoining of the rate legislation, the message to the Illinois Commission was clear – do not step on SBC's toes. Or, in other words, the public interest in Illinois is SBC's interest.

This is not the first time SBC has threatened the authority of the Illinois Commission. SBC, of course, threatened to delay, or even withhold, its investment in Project Pronto in Illinois if the Illinois Commission followed through on its order to provide competitive access to CLECs to the architecture.[187] While SBC's actions have centered on the Illinois Commission, the effects will most certainly be felt by other state commissions in the region. If the largest state commission in the region can have its authority circumvented, so too can the others.

SBC's actions in regard to the rate legislation strike at the very heart of the 1996 Act and the pro-competitive policies underscoring the Act. State commissions have been given the crucial role of setting cost-based rates, and if they are not allowed to do so, then the very essence of the Act is undercut. Not only did the legislation significantly increase UNE loop rates in Illinois, but it also had other anti-competitive implications. For instance, it stayed the increase for those CLECs with fewer than 35,000 lines for two years. If a CLEC went above that limit it would face an immediate rate increase. Thus, as the court noted, a CLEC would have to choose

[187] *See* Tammy Williamson, *SBC to fire thousands, hits regulatory scene: Ameritech Parent had told state it would hire in '01*, Chicago Sun-Times, Oct. 23, 2001, Financial Section.

between foregoing expansion and paying higher rates.[188] Larger CLECs may be pushed out of the market. As the court insightfully concluded:

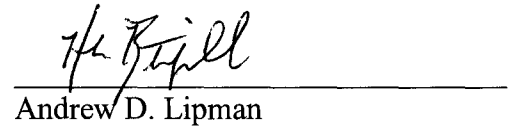
> The public interest factor also weighs heavily in favor of enjoining the legislation. The legislation is anti-competitive. It will make it harder for competitors to compete with SBC. Less competition means less choices for consumers, and less choices for consumers ultimately leads to higher prices.[189]

As long as SBC continues its appeal in support of this anti-competitive legislation that is clearly detrimental to the public interest, its application cannot be found to be in the public interest.

VI. CONCLUSION

For the foregoing reasons, Commenters respectfully request that the Commission deny SBC's Application for Section 271 authorization in Illinois, Indiana, Ohio and Wisconsin.

Respectfully submitted,



Andrew D. Lipman
Patrick J. Donovan
Harisha J. Bastiampillai
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W.
Suite 300
(202) 424-7500 (telephone)
(202) 424-7645 (facsimile)

Counsel for Commenters

Dated: August 6, 2003

---

188 *Voices for Choices* at 15.

189 *Voices for Choices* at 17.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

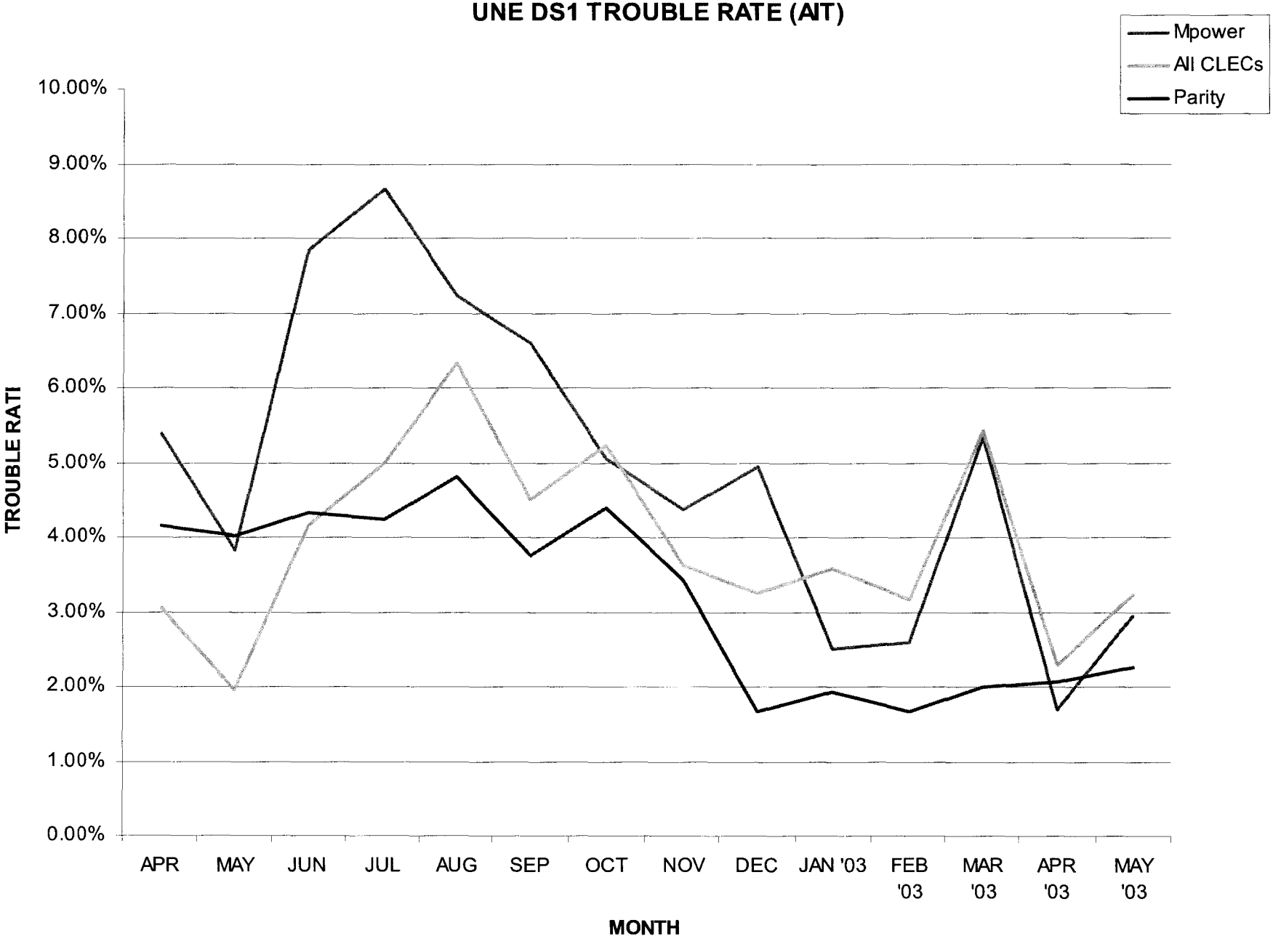
In the Matter of	)	
	)	
Joint Application by SBC Communications Inc.,	)	
Illinois Bell Telephone Company, Indiana Bell	)	
Telephone Company Incorporated, The Ohio Bell	)	
Telephone Company, Wisconsin Bell, Inc., and	)	WC Docket No. 03-167
Southwestern Bell Communications Services,	)	
Inc., for Authorization Under Section 271	)	
Of the Communications Act to Provide	)	
Provide In-Region, InterLATA Service in	)	
Illinois, Indiana, Ohio, and Wisconsin	)	

COMMENTS OF ACN COMMUNICATIONS SERVICES, INC., BULLSEYE TELECOM, INC., CHOICE ONE COMMUNICATIONS INC., CIMCO COMMUNICATIONS, INC., INDIANA FIBER WORKS, LLC., MPOWER COMMUNICATIONS CORP., AND POWERNET GLOBAL COMMUNICATIONS, INC.

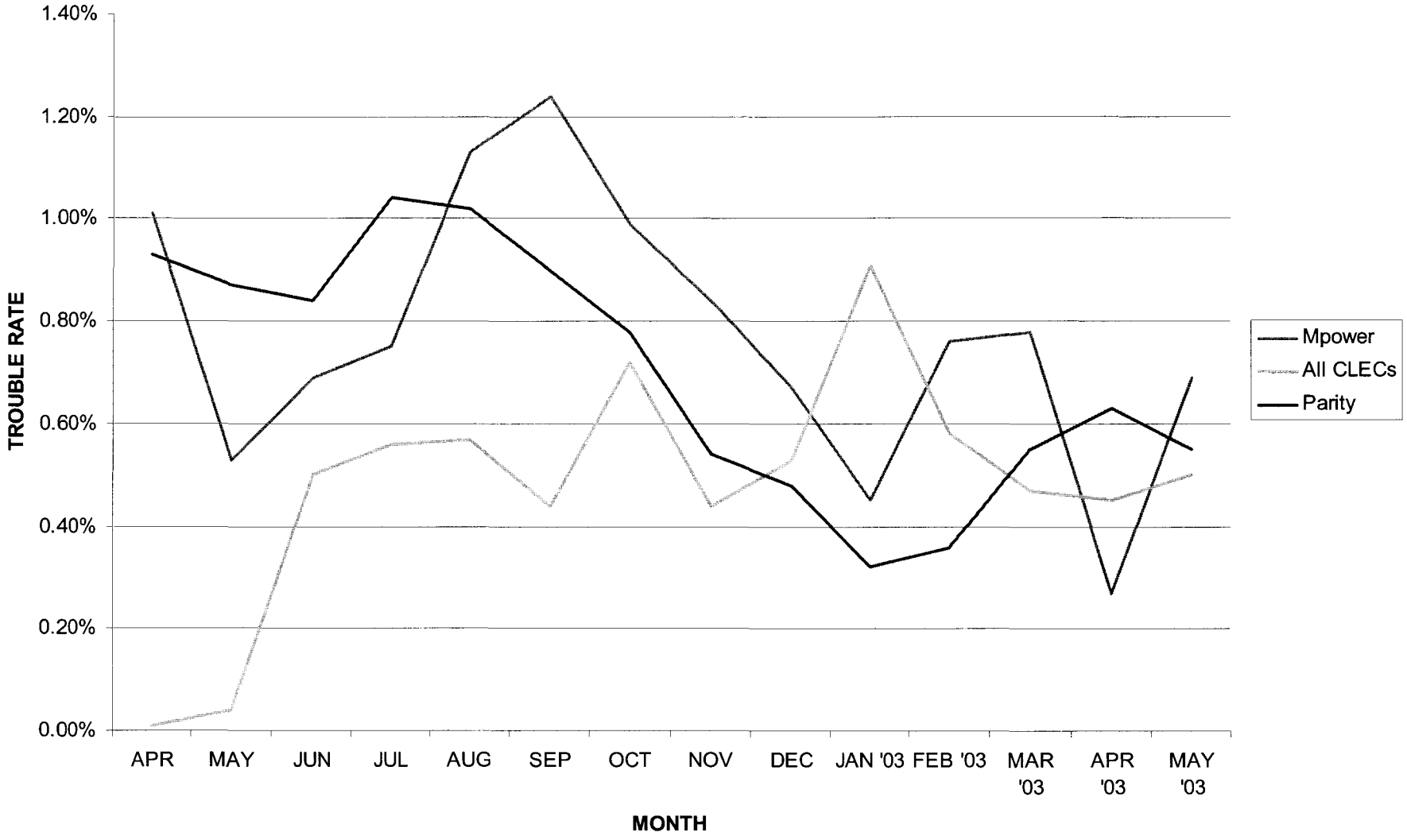
Exhibit A

Mpower Analysis of Ameritech Illinois Trouble Report Performance

EXHIBIT A

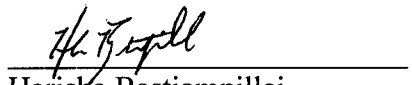

UNE DS1 TROUBLE RATE (AIT)
Mpower
All CLECs
Parity
10.00%
9.00%
8.00%
7.00%
6.00%
5.00%
4.00%
3.00%
2.00%
1.00%
0.00%
TROUBLE RATI
APR
MAY
JUN
JUL
AUG
SEP
OCT
NOV
DEC
JAN '03
FEB '03
MAR '03
APR '03
MAY '03
MONTH

DSL TROUBLE RATE (AIT)



CERTIFICATE OF SERVICE

I, Harisha Bastiampillai, hereby certify that on August 6, 2003, I caused to be served upon the following individuals the Comments of ACN Communications Services, Inc., BullsEye Telecom, Inc., Choice One Communications Inc., CIMCO Communications, Inc., Indiana Fiber Works, LLC, Mpower Communications Corp., and PowerNet Global Communications, Inc.and supporting materials in WC Docket No. 03-167.



Harisha Bastiampillai

Via ECFS

Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room CY-B402
Washington, D.C. 20554

Via Electronic Mail

Qualex International
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554
Qualexint@aol.com

jmyles@fcc.gov
parluk@fcc.gov
jfeipel@icc.state.il.us
khenry@urc.state.in.us
nicholas.linden@psc.state.wi.us
hisham.choueiki@puc.state.oh.us
layla.seirafi-najar@usdoj.gov

Via Overnight Delivery:

Michael K. Kellogg
Geoffrey M. Klineberg
Leo R. Tsao
Kellogg, Huber, Hansen, Todd &
Evans, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036

Layla Seirafi-Najar
U.S. Department of Justice
Antitrust Division
Telecommunications and Media
Enforcement Section
1401 H Street, N.W., Suite 8000
Washington, D.C. 20530

Via First Class Mail:

Jon Feipel
Illinois Commerce Commission
527 East Capital Avenue
Springfield, IL 62701

Karl Henry
Indiana Utility Regulatory Commission
302 West Washington Street
Suite E-306
Indianapolis, IN 46204

Nicholas Linden
Wisconsin Public Service Commission
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707

Hisham Choueiki
Ohio Public Utilities Commission
180 East Broad Street
Columbus, Ohio 43215

James D. Ellis
Paul K. Mancini
Martin E. Grambow
John T. Lenahan
Kelly M. Murray
Robert G. Gryzmala
Randall Johnson
Travis M. Dodd
John D. Mason
SBC Communications, Inc.
175 E. Houston
San Antonio, Texas 78205

Louise Sunderland
Mark Ortleib
Illinois Bell Telephone Company
225 West Randolph St., Floor 25
Chicago, IL 60606

Via First Class Mail:

Mary Ryan Fenlon
Jon F. Kelly
The Ohio Bell Telephone Company
150 E. Gay Street, Room 4-A
Columbus, Ohio 43215

Bonnie K. Simmons
Indiana Bell Telephone Company
240 North Meridian Street
Room 1831
Indianapolis, IN 46204

Peter J. Butler
Wisconsin Bell, Inc.
722 North Broadway, Floor 14
Milwaukee, WI 53202